Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

JOANNA HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RUBEN RAMIREZ
Attorney for Petitioner
520 West Pecan Blvd.
McAllen, Texas 78501
(956) 618 - 1200

QUESTIONS PRESENTED

Can a law enforcement officer who has stopped a motorist for a traffic law violation use selective prosecution and ask the motorist questions designed to help the law enforcement officer develop a hunch that the motorist is involved in criminal activity into articulable reasonable suspicion which can be used to justify prolonging the detention of the motorist beyond the time necessary to complete the traffic stop violating the motorist's rights under the Fourth and Fourteenth Amendments thus excluding all evidence obtained from the stop as "fruits of a poisonous tree"?

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The Order denying re-hearing of the United States Court of Appeals for the Eleventh Circuit is attached as Appendix A. The Opinion of the United States Court of Appeals for the Eleventh Circuit is attached as Appendix B. The Memorandum Opinion And Order of the United States District Court for the Middle District of Alabama is attached as Appendix C. The Recommendation of the Magistrate Judge of the United States District Court for the Middle District of Alabama is attached as Appendix D.

STATEMENT OF JURISDICTION

The Jurisdiction of this Court is based on 28 U.S.C. § 1254 (1). The Jurisdiction of the United States Court of Appeals for the Eleventh Circuit was based on 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of Amendment IV of the United States Constitution provides that people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, ...".

The relevant portion of Amendment XIV of the United States Constitution provides "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

21 U.S.C. § 841 (a) (1):
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacturer, distribute, or dispense, or posses with intent to manufacturer, distribute, or dispense, a controlled substance...

STATEMENT OF THE CASE

On July 15, 2003 the Grand Jury returned a two count indictment against Joanna Hernandez (Hereinafter "Hernandez") for knowingly and intentionally possessing with intent to distribute 5 kilograms or more of cocaine hydrochloride, a Schedule II controlled substance, in Violation of title 21, United States Code, Section 841(a)(1) and a count forfeiting her property. On August 19, 2003 Hernandez filed a Motion to Dismiss and a Motion to Suppress.

On October 16, 2003 an evidentiary hearing was held before Magistrate Judge Boyd and she recommended to the District Court that the Motion to Suppress and the Motion to Dismiss be granted. [Appendix D , infra, p. 60a]

The Government filed objections to the recommendation of the Magistrate Judge and the district court set the matter for an evidentiary hearing (Trial de Novo) on December 19, 2003. On March 22, 2004, District Judge Fuller issued his Memorandum Opinion and Order granting Hernandez's Motion to Suppress and Motion to Dismiss [Appendix C, infra, p.20a]

The Government appealed the District Court's decision stating that the District Court incorrectly ruled that articulable suspicion of illegal activity was not present in the case and that the Courts erroneous fact findings led it to apply an incorrect legal analysis and consequently to err in granting Hernandez's motions.

On July 29, 2005, the United States Court of Appeals for the Eleventh Circuit issued its opinion reversing the order from the District Court. [Appendix B, infra, p.3a] On March 15, 2006, the Court of Appeals for the Eleventh Circuit denied Hernandez's Motion for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

1. This Court should settle the question of whether an officer who has stopped a motorist for a traffic violation can ask questions designed to help the officer develop a hunch that the motorists is involved in other criminal activities into articulable reasonable suspicion which can then be used to justify prolonging the detention beyond the time necessary to complete the traffic stop, violating the motorist's rights under the U.S. Constitution.

2. This Court should settle the Question of whether geographical profiling as a form of selective prosecution should be held to violate the U.S. Constitution.

3. The decision of the Court of Appeals for the Eleventh Circuit is in conflict with holdings within its own Circuit and with other Circuits, requiring the exercise of this Court's supervisory powers.

I.

UNDER EXISTING LAW, A LAW ENFORCEMENT OFFICER WHO HAS STOPPED A MOTORIST FOR A TRAFFIC LAW VIOLATION CANNOT ASK QUESTIONS DESIGNED TO HELP THE

OFFICER DEVELOP A HUNCH THAT THE MOTORIST IS INVOLVED IN OTHER CRIMINAL ACTIVITY INTO ARTICULABLE REASONABLE SUSPICION WHICH CAN THEN BE USED TO JUSTIFY PROLONGING THE DETENTION BEYOND THE TIME NECESSARY TO COMPLETE THE TRAFFIC STOP.

The Fourth Amendment to the United States Constitution protects the right of persons to be free from unreasonable searches and seizures. U.S. Const. Amend. IV. "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). A seizure takes place "[w]henever a police officer accost an individual and restrains his freedom to walk away and the Fourth Amendment requires that the seizure be reasonable." Id. (internal citations and quotations omitted). Traffic stops qualify as seizures under the Fourth Amendment. *See, e.g., Whren v. United States*, 517 U.S. 806, 809-10 (1996) ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment.]"; *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). [Appendix C,

infra, p. 41a]

Because traffic stops are considered more similar to investigative detentions than formal arrests, courts analyze the legality of traffic stops for Fourth Amendment purposes under the standard articulated in *Terry v. Ohio*, 392 U.S. 1 (1968). *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). Under *Terry*, the judicial inquiry into the reasonableness of a search or seizure "is a dual one - whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19. A traffic stop "may not last any longer than necessary to process the traffic violation unless there is articulable suspicion of other illegal activity." *United States v. Boyce*, 351 F.3d 1102, 1106 (11th Cir. 2003) (internal quotations and citations omitted). Simply put, a law enforcement officer making a valid traffic stop must not prolong the stop for longer than necessary to process the traffic violation without having some reasonable suspicion of other criminal activity sufficient to warrant prolonging the stop. [Appendix C, infra, p. 42a]

In addition, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in

a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Once an officer's suspicions have been verified or dispelled, the detention must end unless there is additional articulable, reasonable suspicion for further extending the detention. When making reasonable suspicion determinations, courts must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrong-doing beyond that which justified the traffic stop. [Appendix C, infra, p. 42a]

The real issue in this case is whether the officer's interrogation of Hernandez (the passenger) and the driver after the initial stop of the vehicle for speeding exceeded the "reasonable scope" of the stop's original purpose and violated *Terry's* second prong. Hernandez is not questioning whether the officer's action was justified at its inception but she does question whether his action was reasonably related in scope to the circumstances which justified the interference in the first place. In the instant case, the officer's admitted that most of his questions were not related to the traffic stop such as:

1. "What are you going to do in Atlanta?";
2. How long they were staying in Atlanta?;
3. is it the first time to Atlanta?;
4. how long the driver had been with the

passenger;
5. did they have any family in Atlanta?;
6. is it a "spur-of-the-moment trip"?;
7. "What kind of work do you do?"
8. The weather in Houston?;
9. "Who's this fella back here?"; (in the patrol unit)
10. What is wrong with the aunt?;
11. Was the aunt in the hospital?
12. What area of Atlanta does aunt live?;
13. "Where's your luggage at?";
14. How much luggage they had?;
15. "Ya'll just coming up here on vacation?";
16. "Been driving all night?";
17. The difference between an LVN and LPN;
18. Conversation about New Orleans; ("pee and vomit");
19. "What kind of mileage do you get from the truck?";
20. "How long since you been to Mexico?";
21. "What part of Mexico?"; and
22. "Did yo like it (Mexico)?".

The Defendant argued that these unrelated questions were made illegally and in an effort to prolong the stop to get the K-9 unit to the scene or in a "fishing expedition" to develop a "hunch" to argue reasonable suspicion later.

In the instant case, the Eleventh Court of Appeals relied on *Muehler v. Mena*, 125 S. Ct. 1465 (2005) in reversing the dismissal by the District Court. Hernandez would urge this Court to accept this Writ of Certiorari based on the Eleventh Circuit misapplying a search warrant case to a "Terry stop" case. There is a fundamental difference between issues involved in a "Terry stop" and a seizure conducted pursuant to a search warrant. The officers in *Muehler* had a search warrant signed by a magistrate acknowledging probable cause to search the individuals for weapons and evidence of gang membership. The search was legal, thus the duration of the search was not in question.

The Eleventh Circuit in this case also put an emphasis on the exact duration of the stop up until consent was obtained from the motorist, stating in a footnote that "we doubt that a resultant seizure of no more than seventeen minutes can ever be unconstitutional on account of duration:..." [Appendix B, infra, p.18a] If this logic is followed, then the Fourth Amendment rights against illegal search and seizure have been given a definite time schedule where they can never be triggered. Thus, an officer can always disregard the Constitution of the United States for at least seventeen minutes and be intrusive into all matters of citizen's lives without offending his or her expectation of privacy.

The Government's arguments focus on the fact that the motorists eventually gave consent to search and the fact that some of the questions that the officer asked aided him in developing the reasonable suspicion that the Government contends he had when he asked later for the consent to search. The District Court stated that it could not ignore the fact that prior to the time he began to write the warning citation and prior to the time he initiated the routine computer check, the officer asked questions unrelated to officer safety, and unrelated to obtaining the driver's licenses, vehicle registration and insurance. [Appendix C, infra, p. 54a]

The officer continued to ask questions of Hernandez and the driver after beginning to write the warning citation and after initiating the computer check. Eventually, the officer asked for consent to search the vehicle. The officer did testify that if consent to search the vehicle had not been given he would have detained the motorists until the drug sniffing dog could arrive and sniff the vehicle. [Appendix C, infra, p.55a]

Furthermore, this Court stated in *United States v. Cortez,* 449 U.S. 411, 101 S. Ct. 690 (1981) that in the course of evaluating the validity of a *Terry* stop, considering the totality of the circumstances is a process that does not deal with hard certainties, but

with probabilities. "Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as fact-finders are permitted to do the same- and so are law enforcement officers.", *United States v. Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990). The Eleventh Circuit stated that the "corollary to such a statement, however, is that in formulating such commonsense conclusions, neither police officers nor courts should sanction as "reasonably suspicious" a combination of factors that could plausibly describe the behavior of a large portion of the motorists engaged in travel upon our interstate highways." *Id.* at 1371. This statement fits the essence of Hernandez' argument in her case. As shown by the facts, the officer formulated certain conclusions, either through commonsense or based on his training. These conclusions are argued by the Government to form reasonable articulable suspicion to detain the Defendant and search her vehicle. Hernandez would argue that this can be caused by nervousness or anxiety due to being stopped by police and are "factors that could plausibly describe the behavior of a large portion of motorists engaged in travel....." The reasons outlined by the officer which he claimed were suspicious are as follows:

1. *The need for a restroom:* The driver and Hernandez were from Houston, Texas. They were not familiar with the area and could have easily missed the prior exit indicating possible restroom facilities. In the alternative, it is plausible for a driver to use the restroom excuse to try to get out of a traffic violation.

2. *Food containers in the vehicle:* Thousands of motorists purchase food and eat on the road. This does not give rise to reasonable suspicion of a crime being committed.

3. *Minimal luggage:* The officer testified that Hernandez and the driver had two small bags for a week- long trip. In applying *Tapia*, it is plausible for motorist to begin a trip thinking it was going to be a short trip and then later realize that they might have to spend a few days longer than expected.

4. *Discrepancies in the nature of the trip:* The officer testified that the driver mentioned he was on vacation and Hernandez stated she was going to visit

a sick aunt. On cross examination, the officer admitted that motorists can have two different reasons for traveling together, something that is plausible with motorist.

5. *Non-stop travel from a known source city to a known source city:* Hernandez would argue that this cannot give rise to reasonable suspicion. Any major city can be called a "source city".

6. *Traveling during a tropical storm:* Hernandez would argue that foul weather has not stopped travelers from their destination and it would not be uncommon for a storm to hinder only a small portion of the trip.

7. *Hernandez's uncertainty about her specific destination in Atlanta:* Hernandez and the driver knew that their destination was Atlanta and it is plausible that neither of them knew whether the place was within Atlanta's city limits or which exit they were to take.

8. *Discrepancies in stories about length*

of trip: Hernandez and the driver were not sure how long they were staying in Atlanta. It is plausible that each one had a different idea on how long they would stay.

9. *Unusual behavior and nervousness:* It is plausible for a passenger to be nervous for being stopped by police and having diarrhea. The driver was nervous throughout the traffic stop. Drivers who are stopped by police and put in a police car cannot help but to be nervous. It is an uncomfortable experience and such nervousness has been held not to be a reason to hold individuals during a traffic stop. (See *United States v. Perkins*, Supra.)

Furthermore this Court in *United States v. Arizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002), in applying the totality of the circumstances test found in *Terry v. Ohio*, points out two important facts; the District Court has superior access to the evidence and the reviewing courts have the inability to reconstruct what happened in the courtroom. *Arizu,* at 752.

This is important because there have been two

extensive evidentiary hearings where the Magistrate Judge and the District Judge heard all evidence, saw the demeanor of the witnesses, read transcripts and carefully reviewed the video tape of the stop. Then with all their training and experience, made "inferences from and deductions about the cumulative information available to them that might well elude an untrained person," applied the "totality of the circumstances" test and ruled in favor of Hernandez.

Hernandez would argue that there was no articulable suspicion in this case. The officer asked questions unrelated to the traffic stop which in turn created a "fishing expedition" frowned upon by many Courts.

Based on the above, the Eleventh Circuit clearly erred in reversing the District Court's Order of Dismissal and the only remedy is for this Court to grant this Writ and uphold the District Court's findings.

II.

SINCE RACIAL PROFILING, AS A FORM OF SELECTIVE PROSECUTION, HAS BEEN HELD TO VIOLATE THE U.S.

CONSTITUTION, GEOGRAPHICAL PROFILING, AS A FORM OF SELECTIVE PROSECUTION, SHOULD ALSO BE HELD UNCONSTITUTIONAL.

The United States Constitution Amendment XIV states that "no state shall... deny to any person within its jurisdiction the equal protection of the laws... The Defendant argues that the officer has had a policy of select prosecution which led to the arrest of the Defendant. Defendant would argue that such prosecution is unconstitutional based on the Fourteenth Amendment of the U. S. Constitution and all evidence in this case should be suppressed.

The officer testified on October 16, 2003 and again on December 19, 2003 that he uses the U.S. Customs to run a records check on certain individuals whom he has stopped for a traffic violations. Such record check includes criminal histories, outstanding warrants and *border crossings*. He testified that he uses customs when he verifies that the vehicle stopped has license plates from states that border Mexico, such as Texas, New Mexico and California or when the individual stopped is traveling from a border state. The officer made it clear that he called customs for a records check in this particular case because the vehicle had

Texas plates and the driver had a Texas driver's license.

The officer also testified that if he stopped an individual that was living in Montgomery Alabama, traveling from home to work, he would call DPS for a license and registration information which would be quicker than a criminal history check.

Defendant would cite *Whren vs. United States,* 517 U.S. 806 (1996) where this Court stated "that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause, not the Fourth Amendment.". This defendant would argue that the officer violated the Equal Protection Clause in that he had a policy of geographical profiling in checking border crossing records, via the U.S. Customs, when he stopped the driver for speeding. This decision to use Customs as opposed to DPS delayed the stop and gave the officer time to question the driver on unrelated matters. This amounted to a "fishing expedition" which eventually lead to an illegal prosecution of this defendant.

The officer testified that the Alabama DPS trains troopers, like himself, to look for other things

beyond the traffic violation, such as, the individual traveling form a border state, border crossings and out of state license plates. This training, in itself, creates a policy of geographical profiling. Such profiling is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Based on the above, this Defendant would urge this court to grant this Writ of Certiorari.

III.

THE HOLDING OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CONFLICTS WITH HOLDINGS WITHIN ITS OWN CIRCUIT AND WITH OTHER CIRCUITS, REQUIRING THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Eleventh Circuit Court of Appeals and other circuit courts have had many occasions to decide cases arising under *Terry's* second prong in the context of traffic stops. The resulting patchwork of decisions is somewhat challenging to distill into a set of rules or guiding principles. [Appendix C, infra. p. 46a]

"Some courts appear to interpret *Terry's* admonition that officer's actions need to be

"reasonably related in scope to the circumstances which justified the interference in the first place" as a limitation on the officer's ability to extend, through questions or other actions, the *duration* of the stop beyond the amount of time which such a stop would take otherwise. *See, e.g., United States v. Shabazz*, 993 F. 2d 431, 436 (5th Cir. 1993) (holding that questions, which in themselves are neither searches nor seizures, are relevant to whether a detention has exceeded its lawful duration and that the police officer's questioning of defendants regarding their recent whereabouts did not exceed the original scope of a traffic stop for speeding because the questioning occurred while a computer check was running and did not extend the duration of the initial stop). Other courts appear to focus on limiting the nature of the officer's queries to the offense for which the stop was initiated. *See, e.g., United States v. Holt*, 264 F.3d 1215, 1228 - 31 (10th Cir. 2001) (holding that "the Fourth Amendment reasonableness of a traffic stop based on probable cause must be judged by examining both the length of the detention and the manner in which it is carried out and rejecting the argument that the nature of the questioning during a traffic stop is irrelevant so long as it doesn't unreasonably prolong that stop's duration); *United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001), *cert. denied*, 535 U.S. 948 (2002) ("During a traffic stop, a police officer is

allowed to ask questions that are reasonably related in scope to the justification for his initiation of contact and to broaden the questioning beyond that subject he must have an articulable reasonable suspicion.")." [Appendix C, infra. p. 46a - 47a]

"In various cases, the Eleventh Circuit Court of Appeals appears to have vacillated between these two approaches leaving the status of the law uncertain. For example, in *United States v. Pruitt*, 174 F.3d 1215 (11th Cir. 1999), *cert. denied,* 528 U.S. 1023 (1999), the Eleventh Circuit Court of Appeals appeared inclined to limit the nature of a law enforcement officer's queries to a motorist to those relating to the traffic offense for which the stop was made and the legal documents necessary to process the stop. In *Pruitt*, the Eleventh Circuit held that a law enforcement officer who had stopped a motorist for a traffic law violation could *briefly* question the motorist regarding the traffic offense and could obtain the driver's license, registration, and insurance papers. 174 F. 3d at 1220-21. Furthermore, where the law enforcement officer observed the traffic offense, his questioning following the stop "should have been directed to securing [the driver's] license, registration and insurance papers." *Id.* The Eleventh Circuit Court of Appeals held that if after asking the legitimate questions relating to the basis of the traffic offense

and to obtaining the driver's license, registration, and insurance papers, the law enforcement officer has no basis for reasonable suspicion that the person stopped is involved in criminal activity other than that which formed the basis of the stop, *additional questions on other topics* "are simply irrelevant, and constitute a violation of *Terry*." *Pruitt,* 174 F. 3d at 1221. Put another way, a law enforcement officer may not delay in obtaining the information necessary to complete the traffic stop and in writing the citation in order to ask the motorist questions unrelated to the purpose of the stop in order to turn a hunch into reasonable suspicion which could justify a more extensive detention." [Appendix C, infra. p. 47a - 48a]

In *United States v. Perkins*, 348 F. 3d 965 (11th Cir. 2003), the Eleventh Circuit emphasized that:

"In this Circuit, we have required more than the innocuous characteristics of nervousness, a habit of repeating questions, and an out-of-state license for giving rise to reasonable suspicion." See *United States v. Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999) (holding that the fact that the driver was Hispanic and had an out-of-state license plate was not enough to detain him beyond the issuance of the speeding ticket); *United States v. Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990) ("Being Mexican, having few pieces

of luggage, being visibly nervous or shaken during a confrontation with a state trooper, or traveling on the interstate with Texas plates (not yet a crime in Alabama)... fail to suggest that appellant...[was] engaged in any criminal activity other than speeding on the highway."). *United States v. Perkins*, at p. 971.

"On the other hand, the Eleventh Circuit has also shown a willingness to find that the Fourth Amendment is not offended so long as the duration of the traffic stop is not extended. For example, if the law enforcement officer asks questions *while writing the ticket or warning* so that the queries do not cause the motorist to be seized or detained any longer than he would have been absent the questions being asked, then the law enforcement officer can ask questions unrelated to the reason for the traffic stop or about the driver's documents. *See, United States v. Griffin*, 109 F. 3d 706 (11th Cir. 1997). Additionally, a law enforcement officer did not exceed the scope of a permissible traffic stop when he asked the defendants whether they had guns, firearms, or narcotics in their car *during the time that his routine computer check on them was being processed and that he was completing the citation. See, United States v. Purcell*, 236 F. 3d 1274 (11th Cir. 2001). Moreover, in addition to asking questions of the motorist, law enforcement may use

a drug-sniffing dog on a vehicle stopped for a violation of a traffic regulation so long as the use of the dog does not detain the driver any longer than necessary to process the traffic violation. *See, e.g., United States v. Holloman*, 113F. 3d 192, 196 (11th Cir. 1997)." [Appendix C, infra. p. 49a]

"Further confusing matters is that despite the holding in *Pruitt*, the Eleventh Circuit subsequently published two decisions which, rather than applying *Pruitt* as dispositive on the question of the scope of the traffic stop, discuss the possible outcome of the case under the competing approaches employed by the Fifth and Tenth Circuit Court of Appeals without adopting either standard. *See, e.g., United States v. Boyce*, 351 F.3d 1102, 1111 (11th Cir. 2003) (recognizing that there are two possible test for when a police investigation exceeds the scope of a routine traffic stop – the one employed by the Tenth Circuit and the one employed by the Fifth Circuit – but declining to determine which test is controlling and holding that the investigation exceeded the permissible scope of an investigatory stop under either test); *United States v. Purcell*, 236 F.3d at 1279 - 1280 (describing the approaches to determining whether a police officer has exceeded the scope of a routine traffic stop adopted by the Fifth and Tenth Circuits and declining to adopt one of the approaches because under either approach the

questioning was permissible). By discussing the approaches used by the Fifth and Tenth Circuits rather than applying the *Pruitt* approach, it would seem from these cases that at least these two panels of the Eleventh Circuit think that the question of the correct approach has not been settled in this Circuit." [Appendix C, infra. p. 50a - 51a]

Furthermore, the Fifth Circuit has held, in such cases such as *United States v. Dortch*, 199 F. 3d 193 (5th Cir. 1999); *United States v. Muchaca - Barrera*, 261 F. 3d 425 (5th Cir. 2001) and *United States v. Santiago*, 310 F. 3d 336 (5th Cir. 2002), that "questioning unrelated to the justification for the stop that extends the duration of the stop violates the Fourth Amendment." *Muchaca - Barrera* at 432-33 n.21 (citing Shabazz, 993 F. 2d at 437).

The Fifth Circuit in *Dortch* concluded that suspicious and inconsistent answers, *Dortch's* alleged nervousness, confusion as to the relationship of *Dortch* to the vehicle's renter, and *Dortch's* absence as an authorized driver on the rental contract "gave rise only to a reasonable suspicion that the car might have stolen." 199 F. 3d at 199. The Court held that none of this evidence created a "reasonable or articulable suspicion that Dortch was trafficking in drugs." *Id.* Similarly in *United States v. Jones*, 234 F. 3d 234, 241-242 (5th Cir. 2000)

(citing *United States v. Holloway*, 965 F. 2d 451, 459 & n. 22 (5th Cir. 1992)), the Fifth Circuit concluded that inconsistent answers about the driver's employment and the driver's acknowledgment that he had been arrested previously on a crack cocaine charge were "at best trivial" grounds for reasonable suspicion of drug trafficking, and even less suggestive than the evidence put forward in *Dortch*. In *Santiago*, the Fifth Circuit concluded that extreme nervousness, potentially inconsistent stories between Santiago and his female passenger, and other possibly suspicious answers did not establish "reasonable or articulable suspicion that Santiago was trafficking drugs....." 310 F. 3d at 338-339, 342 (citing *Dortch* and *Jones* to similar effect).

The Tenth Circuit stated in *United States v. Zubia-Melendez*, 263 F.3d 1155 (10th Cir. 2001) that dubious and inconsistent answers from a motorist can be the basis for articulable suspicion that criminal activity may be at foot, and can justify continued detention for further investigation.

Clearly, this disparity in interpreting *Terry v. Ohio* and articulable reasonable suspicion between the Eleventh Circuit and other circuit courts requires the intervention of this Court in the exercise of it supervisory power.

CONCLUSION

This case presents a question of exceptional importance– whether a law enforcement officer who has stopped a motorist for a traffic law violation use geographical profiling and ask the motorist questions during the stop designed to help the law enforcement officer develop a hunch that the motorist is involved in criminal activity into articulable reasonable suspicion which can be used to justify prolonging the detention of the motorist beyond the time necessary to complete the routine traffic stop violating the motorist's rights under the Fourth and Fourteenth Amendments thus excluding all evidence obtained from the stop as "fruits of a poisonous tree"? By granting the Petition for Certiorari, this Court can correct the decision of the Eleventh Circuit Court of Appeals, which conflicts with decisions not only within the same Circuit but with decisions in other Circuits with respect to the Fourth Amendment. This Court can also address the issue of selective prosecution as it applies to the Fourteenth Amendment.

Accordingly, it is respectfully requested that the Petition for Certiorari be granted.

Respectfully submitted,

Ruben Ramirez
Attorney for Petitioner
520 West Pecan Blvd.
McAllen, Texas 78501
(956)618-1200 Fax: (956) 618-3749

APPENDIX

Appendix A

FILED
U.S. COURT OF APPEALS
MARCH 15 2006
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 04-11776-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JOANNA HERNANDEZ,

Defendant-Appellee.

Appendix A

On Appeal from the United States District Court
for the
Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: EDMONDSON, Chief Judge, DUBINA and HULL Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

ORD-42
(2/05)

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 04-11776

D. C. Docket No. 03-00142-CR-F-N

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

JOANNA HERNANDEZ,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(July 29, 2005)

Before EDMONDSON, Chief Judge, DUBINA and

HULL Circuit Judges. EDMONDSON, Chief Judge:

In this criminal case, the government appeals the district court's order granting Defendant's motion to dismiss and motion to suppress evidence seized from her pick-up truck during a traffic stop. The government argues that the police officer – very soon after the stop began – had reasonable suspicion that the passengers were engaged in other criminal activity justifying the detention that led to the pertinent search. We conclude that the search and seizure did not violate Defendant's Fourth Amendment rights.

Background

Alabama State Trooper Jessie Peoples observed a pick-up truck traveling 78 miles-per-hour in a 70 mile-per-hour zone. At approximately 3:02 a.m.[1] on a Monday, Trooper Peoples pulled the truck over. The Trooper approached the passenger side of the truck and requested the driver to exit. A female passenger, Defendant, sat in the front seat. The Trooper noticed several food containers in the rear

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1 The time is inferred from a videotape of the traffic stop that was recorded from the patrol car.

floor area.

The driver provided the Trooper with a Texas driver's license. As an excuse for speeding, the driver stated that Defendant had diarrhea and needed to go to the bathroom. The Trooper pointed out that the lighted previous exit had bathrooms. The trooper asked the driver about where he was headed and the purpose and length of the trip. The driver responded that he was driving to Atlanta to see Defendant's relative for the weekend but quickly changed his response to the whole week.

At 3:03 a.m., the Trooper escorted the driver to the front passenger seat of the patrol car. As the Trooper began writing the citation, the Trooper asked the driver about the weather in Houston upon his departure, whether he owned the truck, whether this visit was his first time to Atlanta, whether the trip had be planned or was spontaneous, his employment, and the name of the passenger. The driver responded that a severe storm was in Houston when they left. He stated that the Defendant owned the truck and that it was his, but not her, first time to Atlanta.

Just before 3:06 a.m., the Trooper returned to the pick-up truck to talk with Defendant. He asked whether she owned the truck and requested the registration and some identification. He asked her what kind of work she did. To verify the driver's

story, the Trooper then asked Defendant how long she planned to be in Atlanta. She said that she was visiting a sick aunt and would stay probably until Wednesday, depending on her aunt's condition. The Trooper asked where Defendant's aunt resided in Atlanta. Defendant had difficulty answering where the aunt lived, noting that she thought it started with a "G" or "Gaines." In response to the Trooper's question about whether it was "Gwinnett," she stated "yes." The Trooper questioned Defendant about whether the two small bags that he viewed in the back seat of the truck were the only luggage that they had brought for the trip. She responded affirmatively.

Around 3:08 a.m., the Trooper returned to the patrol car and again asked the driver about the purpose of the trip and whether they were driving all night. The driver responded that they – on their trip form Houston to Atlanta – had been traveling non-stop. After the driver made no mention of Defendant's sick aunt, the Trooper further questioned whether they were visiting a sick relative; the driver responded "no."

With the driver still in the patrol car, just before 3:09 a.m., the Trooper contacted United States Customs to check the license validation, the vehicle registration, whether warrants existed for the driver or Defendant, and whether the vehicle had crossed

national borders. The Trooper testified that he contacts Customs in over two-thirds of his stops and that, as a general practice, he does not conclude a traffic stop until receiving a response from the agency. Around 3:12 a.m., the Trooper informed the driver that the Trooper would be issuing a warning. The warning was close to, if not fully, written at this time. But the Trooper testified that he did not consider the traffic stop to have ended because he had not heard back from Customs; he did not deliver the written warning to the driver at this time.

The Trooper then walked to the truck to return Defendant's license and registration. The Trooper observed the Defendant seemed unusually nervous.

The Trooper testified that he, after his conversations with the driver and Defendant, decided to call Chris Brown, a State Trooper who works with a narcotics canine.[2] Trooper Peoples testified that based on the following observations, he decided to aks for consent to search the vehicle: (1) the driver's excuse for speeding – that Defendant suffered diarrhea – despite the availability of restroom facilities at the previous exit; (2) empty food containers in the vehicle; (3) discrepancies in

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2 Trooper Peoples called Trooper Brown just before obtaining consent to search the truck. Trooper Brown arrived on the scene shortly thereafter.

the driver's and Defendant's stories about the trip's length and purpose; (4) a level of nervousness exhibited in both the driver and Defendant that – in the Trooper's experience – was higher then that of the normal motoring public; (5) the decision to begin travel during severe weather in Houston and to continue at night without stopping; (6) Defendant's lack of knowledge about the trip's destination; (7) travel between two main source cities for narcotics; and (8) minimal luggage carried for a supposed week-long trip.

Trooper Peoples then returned to the police car and asked the driver whether they were transporting anything illegal. The driver responded negatively. The Trooper asked the driver for consent to search the truck. The driver agreed and signed a consent form. At 3:18 a.m., the Trooper asked Defendant for permission to search; she also signed the consent form.

Around 3:19 a.m., Trooper Peoples began a search of the truck that lasted approximately twenty minutes. Around 3:28 a.m., Trooper Brown positioned his dog on the passenger side of the truck; the dog gave a positive response to the presence of narcotics. Trooper Peoples then located vacuum-sealed packages behind a concealed trap door; the packages, upon testing, were determined to hold cocaine. By the time that the driver and

Defendant were arrested for the cocaine (around 3:38 a.m.), the Trooper still had not heard back from Customs. During the course of the search, the Troopers offered to take Defendant to the exit with the restroom facilities; she declined the offer.

Defendant filed a motion to dismiss and a motion to suppress the evidence. The district court granted the motions. The Government now appeals.

Discussion

I. District Court Decision

The district court concluded that the Trooper's interrogation of Defendant and the driver went beyond what the court understood to be the strict limits of questions allowed at a traffic stop. The judge then concluded that, either because such questions were asked at all or because asking the questions prolonged the duration and enlarged the scope of Defendant's detention, the traffic stop was unconstitutional before Defendant consented to the search. To be more specific, the district court seemed to think that, because the Trooper – before he began to write the citation or to call for a computer check – asked the driver and Defendant questions that the district court saw as unrelated to either officer safety, the speeding offense, or processing the citation, the seizure must be

unconstitutional.[3]

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3 The district court tried to sort out some of our, and other circuits', earlier decisions on traffic stops. After the district court issued its opinion, the Supreme Court concluded that it is unreasonable extensions of the duration – not the scope of conversation – that could render an otherwise justified detention unreasonable for Fourth Amendment purposes. "[M]ere police questioning does not constitute a seizure," – even if such questioning is about a topic unrelated to the initial purpose of the search or seizure – so long as it does not "prolong[]...the time reasonably required to complete that [initial] mission." Muehler v. Mena, 125 S.Ct. 1465, 1471 (2005) (internal quotations and citations omitted) (holding that no independent reasonable suspicion was required for officers to question person about immigration status while being detained during search for weapons and evidence of gang membership). Although the seizure in Muehler was conducted pursuant to a search warrant, we believe that the focus on duration (and not scope of questioning) is just as applicable to a lawful traffic stop.

Therefore, arguments that the Trooper asked questions unrelated to either officer safety, the speeding offense, or processing the citation are not determinative of our evaluation of the constitutionality of the seizure here. We are to look only at the duration of the seizure given all the circumstances: was it for an unreasonable time? And, of course, a traffic stop will inherently take some time. When an officer is, for instance, looking at a driver's license or waiting for a computer check of registration, he lawfully can at about the same time also ask questions – even questions not strictly

Stressing the resultant delay, the district court also observed that the questions "necessarily prolonged" the detainment and stated that "this is true even thought the total time between the beginning of the stop and the consent to search does not run afoul of the cases setting an outside limit for the total length of a detention for a traffic stop." Memorandum Opinion and Order, United States v. Hernandez, CR No. 03-142 N (M.D. Ala. March 22, 2004), at 28. The district court reasoned that, because the seizure – seemingly from when the first questions was asked that was not strictly necessary for the traffic offense – already "violated the parameters set out in Terry," all of the evidence obtained from the encounter (including the search) had to be suppressed as "fruit of the poisonous tree." Id. at 24, 28-29.

We disagree. We conclude that objective reasonable suspicion existed that Defendant was engaged in other criminal activity and that reasonable suspicion justified the detention up to the point Defendant consented to the search.

II. Analysis

We stress that no one contends that this stop was

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related to the traffic stop.

unlawful stop at its inception: Defendant does not dispute that the Trooper observed the vehicle violate the speed limit. We also observe that Defendant does not contest that she, in fact, consented to the search.[4] Once Defendant gave her consent, the clock restarted for purposes of evaluating the reasonableness of the duration of the intrusion. See United States v. Pruitt, 174 F.3d 1215, 1220 (11th Cir. 1999) (stating that "further questioning unrelated to the initial stop is permissible if the

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4 Although Defendant argues that the consent was tainted by the illegal detention, she makes no argument that the consent – in and of itself – was illegally obtained (for example, that it was coerced or fraudulently obtained). Because we conclude that Defendant was legally detained when she consented to the search, we cannot agree that the consent was invalid as fruit of the poisonous tree. Cf. Florida v. Royer, 103 S.Ct. 1319, 1329 (1983) ("Because we affirm the...conclusion that [defendant] was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search.")

We also reject Defendant's argument that because the Trooper, since the date of the pertinent stop, has testified that he intended to search the vehicle regardless of consent, we should analyze this search as if there were no consent at all. An officer's "subjective intentions" are not relevant for Fourth Amendment analysis. See Whren v. United States, 116 S.Ct. 1769, 1774 (1996).

initial detention has become a consensual encounter"). No contention is made that the search here lasted an unreasonably long time. Therefore, it is only the intermediate period of seventeen minutes of detention leading up to the consent to search that we must evaluate for constitutional reasonableness. See United States v. Purcell, 236 F. 3d 1274, 1279 (11th Cir. 2001) (considering only portion of stop before lawful consent to search as relevant to inquiry of whether duration was unconstitutional). Because Defendant was lawfully detained when she consented, her consent validated the search.

From the first minute of the stop, the driver and Defendant demonstrated suspicious behavior that could warrant an objectively reasonable policeman to believe that Defendant might be involved in other criminal activity. Defendant was traveling at three o'clock in the morning, and the Trooper was able to observe the food containers and small amount of luggage when he first approached the pick-up truck. He testified that he considered the food containers suspicious because people transporting contraband often drive long distances without leaving their vehicles, because they fear leaving the contraband unattended. In fact, the Trooper had received drug interdiction training which instructed that the presence of food containers was a factor that may raise reasonable suspicion in a traffic stop situation.

The Trooper doubtlessly had the right to inquire into why the vehicle was speeding. Later at a hearing, in response to a question asking when he became suspicious, the Trooper stated "[t]he one factor was the restroom issue." The implausibility that the truck was speeding because Defendant was suffering from diarrhea – after they had just passed a lighted exit with restroom facilities in rural Alabama at 3 a.m. (Where rest stops were few and far between) – combined with the Trooper's observation of the food containers and minimal luggage, creates a more suspicious set of circumstances than a mere demonstration of nervousness, use of an out-of-state license, or habit of repeating questions before answering. Cf. United States v. Perkins, 348 F. 3d 965, 970 (11th Cir. 2003) (concluding nervousness, repetition of questions, possession of out-of-state license, and inconsistent statements regarding destination alone insufficient for reasonable suspicion).

And unlike the defendant in United States v. Boyce, 351 F.3d 1102, 1109 (11th Cir. 2003), the driver here never provided an explanation for the implausible speeding excuse upon further questioning. See id. (noting that officer's suspicions that driver would not travel such long distance for ex-girlfriend "virtually evaporated and any justification...for further investigation [based on this

inconsistency] dissipated" once driver explained he was not sure of current status of relationship (internal quotation marks omitted) (brackets in original)). Therefore, right from the start, the Trooper had reason to suspect that he was not dealing with just a speeding case and, thus, reason to detain Defendant longer than perhaps a traffic stop, in itself, would allow.

Once the Trooper developed this reasonable suspicion, he had a duty to investigate more. Untied States v. Harris, 928 F.2d 1113, 1117 (11th Cir. 1991) ("Where... the initial stop was legal, the [officer] had the duty to investigate suspicious circumstances that then came to his attention." (internal quotation marks omitted) (brackets in original)). We note that as each answer to the Trooper's investigate questions failed to allay his concerns, the Trooper's reasonable suspicion was bolstered, thus justifying his continuing to detain Defendant, his call for the dog,[5] and his request to search the truck. By the time the Trooper sought permission to search the truck, at least these circumstances provided a reasonable officer with a

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5 We have concluded that a "canine sniff...is the kind of brief, minimally intrusive investigation technique that may justify a Terry stop." United States v. Hardy, 855 F.2d 753, 759 (11th Cir. 1988).

"minimal, particularized basis," Pruitt, 174 F.3d at 1221, for reasonable suspicion: (1) the implausible excuse for speeding; (2) empty food containers in the vehicle; (3) discrepancies in the stories about the trip's length and purpose; (4) abnormal nervousness in both detainees; (5) nonstop travel at night in severe weather; (6) lack of knowledge on the trip's destination; (7) travel between two main source cities for narcotics; and (8) minimal luggage.[6]

From the start and thereafter with additional revelations, the circumstances –taken together – gave rise to a more worrisome set of circumstances than the cases where we have concluded that no basis for reasonable suspicion existed. Cf. Boyce, 351 F.3d at 1109 (concluding that driving rental car on known drug corridor and planning to return car two days late was insufficient for reasonable suspicion); United States v. Tapia, 912 F.2d 1367,

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6 Again, several of these factors were highlighted in the Trooper's drug interdiction training as circumstances that might raise suspicion in a traffic stop. The Trooper testified that he was instructed that travel at night during inclement weather, nonstop travel, the presence of food containers, inconsistent answers on the trip's length and purpose, confusion about destination and length of stay, unusual nervousness, and travel between source cities, are all characteristic of drug courier transport.

1371 (11th Cir. 1990) (concluding that "being Mexican, having few pieces of luggage, being visibly nervous or shaken during a confrontation with a state trooper, or traveling on the interstate with Texas license plates" was insufficient for reasonable suspicion). Even *if* the duration of the pre-consensual detention in this case did extend beyond what might have been reasonable for just a routine traffic stop, the facts that came to light from the beginning of the stop – facts giving rise to reasonable suspicion that an additional crime was being committed – were more than sufficient to justify this detention of no more than seventeen minutes.

Conclusion

For the foregoing reasons, we conclude that the detention and search were constitutional. Therefore, the district court's orders granting Defendant's motion to dismiss and motion to suppress are REVERSED and the case is REMANDED for further proceedings consistent with this opinion.[7]

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7 We have decided this case on the basis of the argument made to us: that, apart from the Trooper's looking into the traffic violation itself, additional circumstances continued to arise and to confront the Trooper that signaled another crime and justified prolonging the stop. But something else seems

worth pointing out. Where at its inception a traffic stop is a valid one for a violation of the law, we doubt that a resultant seizure of no more than seventeen minutes can ever be unconstitutional on account of its duration: the detention is too short. By the way, no appellate decision has been called to our attention that has held such a short detention – linked to a legitimate traffic stop – to be an unreasonable seizure under the Fourth Amendment on account of the stop's duration.

A traffic stop for speeding can doubtlessly last long enough for the police to ask questions about the reasons for speeding and to conduct a variety of checks about licenses, registration, insurance and so on. We underline that the police are not constitutionally required to move at top speed or as fast as possible. See, e.g., United States v. Sharpe, 105 S.Ct. 1568, 1575 (1985) ("While it is clear that the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion, we have emphasized the need to consider the law enforcement purposes to be served b y the stop as well as the time reasonably needed to effectuate those purposes." (Internal quotations and citation omitted)). For the police to be vigilant about crimes is, at least broadly speaking, a good thing. And at a traffic stop, the police can occasionally pause for a moment to take a breath, to think about what they have seen and heard, and to ask a question or so. The police are authorized to detain traffic violators for a *reasonable* amount of time. No one has contended that the detention here was done in an abusive manner. No evidence in the record shows that seventeen minutes is significantly longer than the range

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of normal for a traffic stop for a moving violation. Even *if* seventeen minutes is some minutes longer than the norm, we questions whether the Fourth Amendment's prohibition of unreasonable seizures is concerned with such trifling amounts of time, when the seizure was caused at the outset by an apparent violation of the law. Of trifles the law does not concern itself: *De minimis non curat lex*. This ancient legal maxim seems especially pertinent when it is the Constitution that we are being asked to apply.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
	)
v.	)CR. NO. 03-142-N
	)
JOANNA HERNANDEZ.	)

MEMORANDUM OPINION AND ORDER

On November 17, 2003, United States Magistrate Judge Delores R. Boyd entered a Recommendation that defendant Joanna Hernandez's Motion to Suppress (Doc. #27) and Motion to Dismiss (Doc. #26) be granted to the extent that they assert a Fourth Amendment challenge to the search which resulted in Hernandez's arrest for possession of cocaine with the intent to distribute it and denied without prejudice to the extent that they assert additional challenges pursuant to the Fifth, Sixth, and Fourteenth Amendments. This matter is now before the Court on the Recommendation of the Magistrate Judge and the Objections to the Recommendation of the Magistrate Judge (Doc. #47) filed by the

Government on November 26, 2003. Pursuant to 28 U.S.C. § 636 (b)(1) (C), this Court has made a *de novo* determination of those portions of the Recommendation of the Magistrate Judge to which objections were made. For the reasons that follow, the Court will OVERRULE the Government's objections and will GRANT Joanna Hernandez's Motion to Suppress and Motion to Dismiss.

PROCEDURAL HISTORY

On July 15, 2003, the Grand Jury returned a one count indictment against Joanna Hernandez (hereinafter "Hernandez") for knowingly and intentionally possessing with intent to distribute 5 kilograms or more of cocaine hydrochloride, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1). On August 19, 2003, Hernandez filed a Motion to Dismiss (Doc. #26) and a Motion to Suppress (Doc. #27). Both motions purport to be premised on putative violations of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. In her Motion to Dismiss, Hernandez argued that all charges against her should be dismissed because of alleged violations of her rights. In her Motion to Suppress, Hernandez argued that the duration and scope of the traffic stop which lead

to the charges against her violated the Fourth Amendment. She also claimed that the State Trooper's policy of selective prosecution and racial profiling led to her arrest and that such a policy violated her rights under the Fourteenth Amendment to the United States Constitution. Finally, Hernandez argued that the oral and written statements she gave to law enforcement were given either when she was actually or constructively under arrest and that her rights under the Fifth and Sixth Amendments were violated. Hernandez waived her right to be tried in the week of September of 2003, and sought a continuance of the case which was granted.

Magistrate Judge Boyd set the Motion to Dismiss and the Motion to Suppress for an evidentiary hearing on October 16, 2003. At the evidentiary hearing, Magistrate Judge Boyd heard testimony from Alabama State Trooper Jessie Peoples (hereinafter "Trooper Peoples"), the officer who initiated the traffic stop which lead to the discovery of forty-three pounds of cocaine hydrochloride in Hernandez's vehicle. Robert Thornton (hereinafter "Agent Thornton") also testified. Thornton is employed by the Alabama Department of Public Safety and is assigned to the Alabama Bureau of Investigations and to a drug interdiction task force known as HIDTA. Both the

Government and Hernandez had ample opportunity to present testimony and exhibits at the evidentiary hearing.

After the evidentiary hearing, Hernandez submitted a Post-Hearing Brief in Support of Motion to Suppress (Doc. #43). In that brief, Hernandez devoted significant attention to the Fourth Amendment issue, failed to address her arguments under the Fifth and Sixth Amendments, and stated that she was not going to pursue the Fourteenth Amendment issue cited in her Motion to Suppress at that point. The Government also submitted a written response in opposition to Hernandez's motions and brief. (Doc. #44).

On November17, 2003, Magistrate Judge Boyd issued the Recommendation of the Magistrate Judge. (Doc. #46). Based on her finding that the detention and search of Hernandez exceeded the limits the Fourth Amendment places on the Government, Magistrate Judge Boyd recommended that the Motion to Suppress and the Motion to Dismiss be granted. While Magistrate Judge Boyd specifically found that the duration alone did not make the traffic stop constitutionally impermissible, she did find that the scope of People's questioning of Hernandez and her traveling companion exceeded the limitations of the Fourth Amendment and that the consent given for the search of Hernandez's

vehicle which was obtained during, what she found to be, an unlawful detention was tainted by People's Fourth Amendment violation and therefore could not be deemed voluntary. Magistrate Judge Boyd denied without prejudice Hernandez's claims of Fifth, Sixth, and Fourteenth Amendment claims.

Magistrate Judge Boyd entered an Order setting a specific deadline for the parties to file objections to the Recommendation. This Order specifically noted that "[f]ailure to file written objections to the proposed finding s and recommendations" would "bar the party from *de novo* determination by the district court of issues covered in the report and shall bar the party from attacking on appeal the factual findings in the report accepted or adopted by the district court except upon grounds of plain error or manifest injustice." Hernandez did not file any objection to the Recommendation of the Magistrate Judge. The Government filed Objections to the Recommendation of the Magistrate Judge (Doc. #47), which it later amended with leave of Court (Doc. #48 & 50).

After receiving the Government's objection, this Court set the matter for an evidentiary hearing on December 19, 2003. At this hearing, both the Government and Hernandez were allowed to present evidence, testimony, and further argument on the

issues before the Court. Both parties agreed that in considering the issues before it, this Court could rely on the testimony and exhibits from December 19, 2003 hearing, as well as testimony and exhibits from the hearing before Magistrate Judge Boyd. Both the Government and Hernandez were allowed additional time to submit further written argument on the issues before the Court. (See Docs. #54, 55, and 56). Thus this court has a more than ample record before it on which to assess the merits of the Recommendation of the Magistrate Judge and Hernandez's motions.

FACTS

The Magistrate Judge provided an excellent and comprehensive factual narrative in the Recommendation of the Magistrate Judge. Hernandez made no objections to the Recommendation of the Magistrate Judge. The Government's objection to the Recommendation of the Magistrate Judge is primarily directed to her application of the law to the fact; however, the Government has articulated one objection to the factual narration in the Recommendation of the Magistrate Judge. The Court ACCEPTS the recitation of the facts set forth in the Recommendation of the Magistrate Judge and

OVERRULES the Government's sole objection to the factual finding.[1] For the sake of clarity, the Court will set forth below the facts most salient to this Court's analysis.

On June 30, 2003, Trooper Peoples was on duty enforcing traffic laws. Shortly after 3:00a.m., Trooper Peoples observed a Chevrolet pickup truck traveling in the northbound, left-hand lane on Interstate 65. The truck was traveling at 78 miles-per-hour in violation of the 70 mile-per-hour speed limit in force on that particular part of Interstate 65. Trooper Peoples initiated a traffic stop near the 165 mile marker which is just past the exit for Hope Hull, Alabama. The pickup truck was pulled over, without incident, at approximately 3:02 a.m.

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1 On page 7 of the Recommendation of the Magistrate Judge, it is stated that "Trooper Peoples had not given the warning ticket as promised at 3:11:52 a.m." The Government argues that Trooper Peoples did not promise to write a warning ticket by a particular time and contends that this language in the Recommendation of the Magistrate Judge implies that the warning ticket would be issued at or shortly after 3:11 a.m. The Court does not agree that is the implication of the statement when taken in context. The statement refers to the fact that at 3:11:52 a.m. Trooper Peoples stated to the driver that it was his intentions to give him a warning ticket and that by the time of his fourth encounter with the driver he had not given that ticket to him.

Appendix C

The traffic stop was captured on a video recording which was offered as an exhibit by both the Government and Hernandez. This thirty-eight minute videotape begins as the truck is being pulled over. Some portions of the videotape have audible audio, but in other places the audio is inaudible. The audio portion of the recording was recorded from a body microphone worn on Trooper Peoples belt which transmitted to a video recording device in Trooper People's car. Gaps in the audio recording are attributable to the following: (1) Trooper Peoples having turned off his body microphone; (2) equipment failure due to the extended distance between the microphone and the video recording device; or (3) technical malfunctions of the recording equipment.

After pulling the vehicle over, Trooper Peoples walked to the passenger side of the vehicle.[2] When Trooper Peoples was first standing beside the truck to ask for the driver to step out, he observed a male driver, later identified as Jesus Alejandro Salazar (hereinafter "Salazar"), and a female passenger, later identified as Hernandez. According

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2 Trooper Peoples indicated that he typically approaches vehicles which are pulled over to the side of the Interstate by approaching the passenger side of the vehicle because it is safer in that it keeps him out of the traffic lane.

to Trooper Peoples, he noticed several food containers on the rear floor area of the vehicle when he was beside the vehicle for the first time.[3] Trooper Peoples asked Salazar if he had his driver's license. Trooper Peoples then asked Salazar to step out of the vehicle and proceed to the area between the truck and Trooper People's car, and Salazar immediately complied.

Trooper Peoples and Salazar stood together at the back of the pickup truck. Salazar immediately produced his driver's license as Trooper Peoples requested. Salazar's license was issued by the State of Texas. Trooper Peoples advised Salazar that he

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3 Trooper Peoples testified that he had received training concerning conduct fo drug couriers which indicated that drug couriers will often be traveling in vehicles which contain food containers because they travel without stopping when they are transporting drugs. Hernandez challenges the veracity of Trooper Peoples' testimony that he observed these food containers at this time, but failed to object to the factual finding in the Recommendation of the Magistrate Judge regarding this fact. In any event, the Court finds Trooper Peoples' testimony on this fact credible. Moreover, the videotape shows Trooper Peoples shining his flashlight into the back of the truck as he walked by it to meet Salazar between vehicles. Contrary to Hernandez's argument Trooper Peoples did have an opportunity to view the food containers at that time rather than when he later searched the interior of the vehicle.

had been driving 78 miles per hour. Salazar replied that he didn't realize that he had been speeding and that he was trying to get to a rest room for his girlfriend who had diarrhea. Trooper Peoples informed Salazar that he had just passed an exit[4] with a rest room. Salazar expressed surprise. Trooper Peoples then asked Salazar where he was headed. Salazar responded that he was headed to Atlanta and said that they were going to see Hernandez's relative. Trooper Peoples asked him how long he was going to be up there. Salazar responded: "The weekend...through the week." Trooper Peoples asked him if he would be there the whole week, and Salazar indicated that was the case. Given that Salazar's ultimate destination was Atlanta, Trooper Peoples found it unusual that Salazar drove past an exit if his girlfriend in fact had diarrhea.

After this brief conversation with Salazar, Trooper Peoples asked him to sit in the front passenger seat of the patrol car.[5] After getting in the vehicle with Salazar, Trooper Peoples spent

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4 Trooper Peoples testified that this was a well-lit exit with a gas station, a Burger King, and several other little businesses.

5 The duration of the traffic stop at this time was approximately one minute.

approximately two minutes in the patrol car with Salazar before exiting the vehicle. During this time, Trooper Peoples' first question to Salazar concerned the ownership of the pickup truck, and Salazar indicated that Hernandez owned it. Trooper Peoples rapidly asked Salazar a number of questions during this time. He asked if Salazar lived in Houston. He asked if it was Salazar's first trip to Atlanta. He asked Salazar for Hernandez's name twice. Trooper Peoples asked how long Hernandez and Salazar had been together and whether Hernandez had family in Atlanta. Trooper Peoples asked if the trip was planned for awhile or embarked upon on the spur of the moment. Trooper Peoples asked Salazar what kind of work he did and what the weather was like in Houston.[6] Trooper Peoples asked Salazar for his reason for speeding and again received information that related to Hernandez's need for a bathroom. At some point during this time, Trooper Peoples began

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6 Salazar's response to this question was not audible, but Trooper Peoples testified that Salazar said that there was a tropical storm with 40 mile-an-hour winds when he left Houston. Trooper Peoples further testified that according to training he had received relating to drug investigations drug couriers will travel in inclement weather or at night in order to try to avoid law enforcement.

to write Salazar a warning ticket[7] and continued to question him while doing so. Trooper Peoples had not yet informed Salazar that the ticket he was writing was a warning ticket, but he had decided to give Salazar a warning because he was not argumentative about his speed. Trooper Peoples also testified that he had begun to write out the warning ticket during this conversation and that

Toward the end of the two minute period, Trooper Peoples asked Salazar if Hernandez had the registration for the pickup truck. Salazar indicated that she did. Consequently, Trooper Peoples exited the patrol car and went to talk to Hernandez who was still seated in the passenger seat of the pickup truck.[8] Trooper Peoples' purpose in approaching Hernandez was to retrieve the registration for

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7 Trooper Peoples testified that you can hear what he says is the sound of him clicking his pen closed on the videotape during the two minutes he was talking to Salazar in the patrol car. According to Trooper Peoples, this sound confirms his recollection that he had started completing the form at some point prior to that time.

8 The duration of the traffic stop at the time Trooper Peoples began questioning Hernandez was approximately three minutes and twenty seconds.

review.[9]

The first minute of Trooper Peoples' conversation with Hernandez at this point in the stop is inaudible. When the audio starts, Trooper Peoples asked Hernandez if she owned the truck. Trooper Peoples requested that Hernandez produce the registration papers and her identification. He then asked her a series of questions. Some of these questions related to the ownership of the truck and Hernandez's identity, but Trooper Peoples also asked what kind of work Hernandez did, how long she and Salazar were going to be in Atlanta, and who Salazar was. After taking Hernandez's license and insurance papers,[10] he told Hernandez that he was "going to check everything."[11] Trooper Peoples asked Hernandez how long they were going to be in Atlanta; she replied probably until Wednesday, but that she was not sure. When Trooper Peoples asked

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9 Alabama law requires drivers to be able to produce drivers' licenses, vehicle registrations, and proof of insurance.

10 Trooper Peoples also testified that he does not recall Hernandez providing him with the registration for the vehicle.

11 Trooper Peoples testified that it was his regular practice to review a driver's license, registration, and proof of insurance on a traffic stop.

why she was not sure, she replied "probably until Wednesday..it just depends on how bad she is." Trooper Peoples testified that Hernandez had previously told him that they were traveling to Atlanta to visit a sick aunt, whether her aunt had been hospitalized, and in what area of Atlanta her aunt resided. Hernandez had difficulty answering the question regarding the area of Atlanta her aunt resided. Hernandez had difficulty answering the question regarding the area of Atlanta in which her aunt resided and said she thought it started with a "G." When Trooper Peoples asked if it was "Gwinnett." Hernandez said that it was. Trooper Peoples asked Hernandez where her luggage was. She showed him and he noted out loud that there were only two small bags. At this point, Trooper Peoples returned to his patrol car. [12]

Once back in the patrol car, Trooper Peoples directed additional questions to Salazar. He asked if the trip to Atlanta was just a vacation. He asked what family members Hernandez had in Atlanta and whether anyone was sick. After asking these questions and receiving answers which were arguably inconsistent with Hernandez's response to

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12 The duration of the traffic stop at this point was approximately five and a half minutes.

his questions, Trooper Peoples initiated a routine[13] computer check by using his cellular telephone, to call U.S. Customs[14] through the BLOC HIDTA system.[15] He provided the full names of Hernandez

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13 Trooper Peoples testified that it is his routine practice to contact either U.S. Customs or some other agency to verify information such as driver's license validity, vehicle registration, and outstanding warrants prior to concluding a traffic stop. Trooper Peoples testified that he uses U.S. Customs through the BLOC HIDTA system to check this information for approximately two-thirds of his traffic stops. He further testified that it is his practice to wait for a call back on the computer check before he releases motorists so he can make sure that the driver's license is valid and that the person is not wanted.

14 The duration of the traffic stop at this time was approximately six minutes and ten seconds.

15 In addition to providing information on the validity of licenses and the existence of warrants, U.S. customs BLOC HIDTA system can provide information about border crossings in which the subject vehicle has been involved, as well as, criminal histories on individuals. Trooper Peoples testified that he had other possible means of obtaining verification of driver's licenses and outstanding warrants on Salazar and Hernandez. Specifically, he could radio to the Department of Public Safety or one of the county agencies to run the information. However, when he checks through the Department of Public Safety he cannot get information on

and Salazar, their driver's license numbers, the vehicle tag, and details of the speeding offense. During the time he was on his cellular telephone providing information to U.S. Customs, Trooper Peoples asked Salazar if he had been driving all night, and Salazar said that they had.

When Trooper Peoples made his call on this particular stop to U.S. Customs, he was not able to

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criminal histories and border crossings. It was clear from Trooper Peoples' testimony that running a computer check of a driver involved in a traffic stop through the U.S. Customs' BLOC HIDTA system was a more comprehensive check than that available to Trooper Peoples from his other sources. In deciding between contacting U.S. Customs or the Department of Public Safety to run a check, Trooper Peoples routinely considers factors including whether the vehicle is from a border state, whether the travelers have been to a border state, and whether the people have given suspicious answers to his questions. If a border state is involved or suspicious answers are given, Trooper Peoples runs the computer check through U.S. Customs rather than the Department of Public Safety. In some circumstances, the computer check through U.S. Customs might take more time than a check through the Department of Public Safety. Specifically, Trooper Peoples testified that running a criminal history check through U.S. Customs in addition to a check on the license and registration information would take more time than running a check through the Department of Public Safety on the license and registration alone.

instantaneously receive the information from the computer check. He provided the number to his cellular telephone so that U.S. Customs could call him back with the results of the computer check. After finishing the call to U.S. Customs, Trooper Peoples began questioning Salazar again. Approximately nine minutes into the traffic stop, Trooper Peoples, informed Salazar that he was going to write him a warning. At the time when Trooper Peoples advised Salazar that he was going to write him a warning, the actual written warning ticket was nearly complete because Trooper People had begun writing it during his first conversation in the patrol car with Salazar. The warning ticket is not a complicated form and could have been completed in less than five minutes.[16] Trooper Peoples continued to question Salazar.

At approximately 3:13a.m., approximately eleven minutes after the traffic stop began, Trooper

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16 Trooper Peoples testified that if everything is going smoothly, a warning citation typically takes four to five minutes to complete. He also testified that in this case, he finished filling in the information on the warning citation form prior to asking for consent to search the pickup truck, but did not provide it to Salazar so that he could sign his name in the appropriate place for the driver's signature because Trooper Peoples was waiting to receive the results of the computer check from U.S. Customs.

Peoples went back to the pickup truck to question Hernandez further and to return her driver's license and insurance papers. At this time, he observed what he believed were non-verbal indications of nervousness such as closed posture and minimal eye contact. After questioning Hernandez, Trooper Peoples returned to the patrol car and asked Salazar further questions such as whether they were transporting anything illegal such as guns or drugs. When Salazar said "no," Trooper Peoples asked if he had a problem with the truck being searched so that Trooper Peoples could make sure. Trooper Peoples then asked if Salazar and Hernandez were involved in any type of terrorist activity. Trooper Peoples then made radio contact with another State Trooper who regularly works with a narcotics canine. While waiting for that officer to arrive with the dog, Trooper Peoples asked Salazar a number of questions ranging from the gas mileage of Hernandez's pickup truck to past travel to Mexico.

At 3:17 a.m., Trooper Peoples presented and explained to Salazar a consent form authorizing a search of the pickup truck. Salazar signed the form. Trooper Peoples then returned to the pickup truck and explained the same type of consent form to Hernandez. She signed it. According to Trooper Peoples neither Salazar, nor Hernandez objected to the search of the pickup truck. After Hernandez

signed the consent form, Trooper Peoples asked her to stand between the vehicles while he searched the pickup truck.

For approximately twenty minutes, Trooper Peoples searched the pickup truck. Trooper Brown and a dog trained to alert to the odor of narcotics assisted in the search. Trooper Peoples located a concealed trap door behind which were located "vacuum-sealed packages." At approximately 3:38 a.m., Hernandez and Salazar were informed of the results of the search and advised of their Miranda rights before being hand-cuffed and arrested. The pickup truck was towed to an auto shop where officers removed parts of the vehicle and accessed the vacuum-sealed packages, which contained forty-three pounds of cocaine.

While Trooper Peoples searched the pickup truck, his cellular telephone was left behind in his patrol car. U.S. Customs was to provide the results of the computer check by calling Trooper Peoples on this cellular telephone. Nevertheless, he did not carry it with him. It does not appear from the record before this Court that U.S. Customs had called Trooper Peoples back with the results of the computer check prior to 3:38 a.m. when Salazar and Hernandez were arrested.

DISCUSSION

A. Fifth and Sixth Amendments Issues

The Recommendation of the Magistrate Judge denied the Motion to Suppress and the Motion to Dismiss without prejudice to the extent that they sought to raise alleged violations of Hernandez's rights under the Fifth and Sixth Amendments to the United States Constitution. Hernandez has offered neither evidence, nor argument in support of either her Motion to Suppress or her Motion to Dismiss on the basis of alleged violations of her rights under the Fifth and Sixth Amendments to the United States Constitution. Consequently, those motions are DENIED to the extent they are premised on such violations.

B. Fourteenth Amendment Issue

Hernandez originally claimed that her rights under the Fourteenth Amendment were violated because she was subjected to racial profiling. Hernandez declined to pursue this issue before the Magistrate Judge, but now argues that she has established that Trooper Peoples selectively prosecuted her and subjected her to "geographical profiling." (*Compare* Docs. #27 & #43 *with* Doc. #55). In making this argument, Hernandez relies on *Whren v. United States*, 517 U.S. 806 (1996), in which the United States Supreme Court stated that

the Fourteenth Amendment to the United States Constitution prohibits selective enforcement of the law based on considerations such as race. In this case, the Court finds no evidence of selective enforcement of the law based on race and declines Hernandez's invitation to extend *Whren* and hold that "geographical profiling" violates the Fourteenth Amendment to the United States Constitution. Consequently, to the extent that the Motion to Dismiss and the Motion to Suppress are based on alleged violations of the Fourteenth Amendment, they are due to be DENIED.

C. Fourth Amendment Issue

1. Overview of Applicable Analytical Framework

The Fourth Amendment to the United States Constitution protects the right of persons to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). A seizure takes place "[w]henever a police officer accosts an individual and restrains his freedom to walk away and the Fourth Amendment requires that the seizure be reasonable."

Id. (internal citations and quotations omitted). Traffic stops qualify as seizures under the Fourth Amendment. *See, e.g., Whren v. United States*, 517 U. S. 806, 809-10 (1996) ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment.]"; *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Perkins*, 348 F.3d 965, 969 (11th Cir. 2003).

Because traffic stops are considered more similar to investigative detentions than formal arrests, courts analyze the legality of traffic stops for Fourth Amendment purposes under the standard articulated in *Terry v. Ohio*, 392 U.S. 1 (1968). *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *United States v. Boyce*, 351 F.3d 1102, 1106 (11th Cir. 2003); *United States v. Perkins*, 348 F. 3d at 969; *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001), *cert. denied*, 534 U.S. 830 (2001). Under *Terry*, the judicial inquiry into the reasonableness of a search or seizure "is a dual one - whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19. A traffic stop "may not last any longer than

necessary to process the traffic violation unless there is articulable suspicion of other illegal activity." *United States v. Boyce*, 351 F.3d 1102, 1106 (11th Cir. 2003) (internal quotations and citations omitted). Simply put, a law enforcement officer making a valid traffic stop must not prolong the stop for longer than necessary to process the traffic violation without having some reasonable suspicion of other criminal activity sufficient to warrant prolonging the stop.

In addition, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Once an officer's suspicions have been verified or dispelled, the detention must end unless there is additional articulable, reasonable suspicion for further extending the detention. When making reasonable suspicion determinations, courts must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrong-doing beyond that which justified the traffic stop. This allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.

2. Analysis of Whether the Stop of Hernandez Was Justified at Its Inception

"As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. at 810. *Accord, United States v. Simmons*, 172 F.3d 775, 778 (11th Cir. 1999). This is an objective standard and the officer's subjective intent in making the stop is not relevant to whether the stop was permissible under the Fourth Amendment. *Whren*, 517 U.S. at 813. *Accord, United States v. Holloman*, 113 F. 3d 192, 194 (11th Cir. 1997). Consequently, where a law enforcement officer observes a traffic violation, the Fourth Amendment is not offended when that law enforcement officer stops a motorist. In this case it is undisputed that Trooper Peoples observed the vehicle in which Salazar and Hernandez were traveling violating the speed limit. Consequently, the initial stop of Salazar and Hernandez did not violate the Fourth Amendment and the first prong of the *Terry* analysis is not an issue in this case.

3. Analysis of Whether the Seizure of Hernandez During the Traffic Stop Was Reasonably Related in Scope to the Circumstances Which Justified the Stop in the First Place

The real issue in this case is whether Trooper Peoples' interrogation of Hernandez and Salazar after the initial stop of the vehicle for speeding exceeded the "reasonable scope" of the stop's original purpose and violated *Terry's* second prong. Before addressing this issue, the Court will first briefly explore what is clearly within the reasonable scope of a traffic stop. It is obvious to this Court that a law enforcement officer who has stopped a vehicle for speeding can question the driver about the speeding offense. For example, a driver can be asked questions concerning: his knowledge of his speed, his knowledge fo the applicable speed limit, and his reason for speeding.

Moreover, it is clear that a law enforcement officer who has validly detained a motorist for a traffic stop is also entitled to "conduct a variety of checks on the driver and his car, including questioning the driver about the traffic violation, requesting consent to search the car, *and* running a computer check for outstanding warrants." *United States v. Simmons*, 172 F.3d at 778 (collecting cases). *Accord, United States v. Boyce*, 351 F.3d at 1106; *United States v. Purcell*, 236 F.3d at 1278 ("The officer may also prolong the detention to investigate the driver's license and the vehicle registration, and may do so by requesting a

computer check."); *United States v. Shabazz*, 993 F. 2d 431, 437 (5th Cir. 1993) (explaining that "in a valid traffic stop, and officer can request a driver's license, insurance papers, vehicle registration, run a computer check thereon, and issue a citation.").

Although it is clear that in a traffic stop the police can run the a forementioned computer checks and ask questions about the traffic offense for which the motorist was stopped, it is far less clear what else a police officer can do during a traffic stop if he does not have an articulable reasonable suspicion that the motorist is involved in criminal activity unrelated to the traffic stop. Can a law enforcement officer who has stopped a motorist for a traffic law violation ask the motorist questions during the stop designed to help the law enforcement officer develop a hunch that the motorist is involved in criminal activity into articulable reasonable suspicion which can be used to justify prolonging the detention of the motorist beyond the time necessary to complete the routine traffic stop? Does it matter if those questions are asked before the law enforcement officer initiates the computer check of the driver and the vehicle or must the officer immediately obtain the driver's license, registration and commence whatever routine computer check he typically conducts before asking such questions? Can the motorist be questioned on topics unrelated

to the traffic stop while the law enforcement officer is in the process of writing out the traffic citation or warning?

The Eleventh Circuit Court of Appeals and other circuit courts have had many occasions to decide cases arising under *Terry's* second prong in the context of traffic stops. The resulting patchwork of decisions is somewhat challenging to distill into a cogent set of rules or guiding principles.

Some courts appear to interpret *Terry's* admonition that officer's actions need to be "reasonably related in scope to the circumstances which justified the interference in the first place" as a limitation on the officer's ability to extend, through questions or other actions, the *duration* of the stop beyond the amount of time which such a stop would take otherwise. *See, e.g., United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993) (holding that questions, which in themselves are neither searches nor seizures, are relevant to whether a detention has exceeded its lawful duration and that the police officer's questioning of defendants regarding their recent whereabouts did not exceed the original scope of a traffic stop for speeding because the questioning occurred while a computer check was running and did not extend the duration of the initial stop). Other courts appear to focus on limiting the *nature* of the officer's queries to the

offense for which the stop was initiated. *See, e.g., United States v. Holt*, 264 F.3d 1215, 1228-31 (10th Cir. 2001) (holding that "the Fourth Amendment reasonableness of a traffic stop based on probable cause must be judged by examining both the length of the detention and the manner in which it is carried out and rejecting the argument that the nature of the questioning during a traffic stop is irrelevant so long as it doesn't unreasonably prolong that stop's duration); *United States v. Murillo*, 255 F. 3d 1169, 1174 (9th Cir. 2001), *cert. denied*, 535 U.S. 948 (2002) ("During a traffic stop, a police officer is allowed to ask questions that are reasonably related in scope to the justification for his initiation of contact and to broaden the questioning beyond that subject he must have an articulable reasonable suspicion.").[17]

In various cases, the Eleventh Circuit Court of Appeals appears to have vacillated between these two approaches leaving the status of the law uncertain. For example, in *United States v. Pruitt*, 174 F.3d 1215 (11th Cir. 1999), cert. denied by *Engel v. United States*, 528 U.S. 1023 (1999), the Eleventh Circuit Court of Appeals appeared inclined to limit

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17 Given the disparity between the approaches of the various Circuit Courts of Appeals, this issue appears ripe for resolution by the Untied States Supreme Court.

the nature of a law enforcement officer's queries to a motorist to those relating to the traffic offense for which the stop was made and the legal documents necessary to process the stop. In *Pruitt*, the Eleventh Circuit held that a law enforcement officer who had stopped a motorist for a traffic law violation could *briefly* question the motorist regarding the traffic offense and could obtain the driver's license, registration, and insurance papers. 174 F. 3d at 1220-21. Furthermore, where the law enforcement officer observed the traffic offense, his questioning following the stop "should have been directed to securing [the driver's] license, registration and insurance papers." *Id.* The Eleventh Circuit Court of Appeals held that if after asking the legitimate questions relating to the basis of the traffic offense and to obtaining the driver's license, registration, and insurance papers, the law-enforcement officer has no basis for reasonable suspicion that the person stopped is involved in criminal activity other than that which formed the basis of the stop, *additional questions on other topics* "are simply irrelevant, and constitute a violation of *Terry*." *Pruitt*, 174 F. 3d at 1221. Put another way, a law enforcement officer may not delay in obtaining the information necessary to complete the traffic stop and in writing the citation in order to ask the motorist questions unrelated to

the purpose of the stop on order to turn a hunch into reasonable suspicion which could justify a more extensive detention.

On the other hand, the Eleventh Circuit court of Appeals has also shown a willingness to find that the Fourth Amendment is not offended so long as the duration of the traffic stop is not extended. For example, if the law enforcement officer asks questions *while writing the ticket or warning* so that the queries do not cause the motorist to be seized or detained any longer than he would have been absent the questions being asked, then the law enforcement officer can ask questions unrelated to the reason for the traffic stop or about the driver's documents. *See, United States v. Griffin*, 109 F. 3d 706 (11th Cir. 1997). Additionally, a law enforcement officer did not exceed the scope of a permissible traffic stop when he asked the defendants whether they had guns, firearms, or narcotics in their car *during the time that his routine computer check on them was being processed and that he was completing the citation. See, United States v. Purcell*, 236 F. 3d 1274 (11th Cir. 2001). Moreover, in addition to asking questions of the motorist, law enforcement may use a drug-sniffing dog on a vehicle stopped for a violation of a traffic regulation so long as the use of the dog does not detain the driver any longer than necessary to process the traffic violation. See, e.g.,

United States v. Holloman, 113 F.3d 192, 196 (11th Cir. 1997).

Further confusing matters is that despite the holding in *Pruitt*, the Eleventh Circuit subsequently published two decisions which, rather than applying *Pruitt* as dispositive on the question of the scope of the traffic stop, discuss the possible outcome of the case under the competing approaches employed by the Fifth and Tenth Circuit Court of Appeals without adopting either standard. *See, e.g., United States v. Boyce*, 351 F. 3d 1102, 1111 (11th Cir. 2003) (recognizing that there are two possible tests for when a police investigation exceeds the scope of a routine traffic stop – the one employed by the Tenth Circuit and the one employed by the Fifth Circuit – but declining to determine which test is controlling and holding that the investigation exceeded the permissible scope of an investigatory stop under either test); *United States v. Purcell*, 236 F.3d at 1279 - 1280 (describing the approaches to determining whether a police officer has exceeded the scope of a routine traffic stop adopted by the Fifth and Tenth Circuits and declining to adopt one of the approaches because under either approach the questioning was permissible). By discussing the approaches used by the Fifth and Tenth Circuits rather than applying the *Pruitt* approach, it would seem from these cases that at least two panels of the

Eleventh Circuit think that the question of the correct approach has not been settled in this circuit.

In this case, Trooper Peoples initiated a traffic stop of Hernandez's vehicle because Salazar was speeding. Trooper Peoples testified that it is his routine practice to complete a computer check of those involved in traffic stops and that most of the time he uses the U.S. Customs system for this check, even though it can in some circumstances be more time consuming, because it provides more information than the other types of computer checks available. Trooper Peoples did promptly obtain Salazar's driver's license. Trooper Peoples questioned Salazar and some of his initial questions clearly relate to the speeding offense which gave Trooper Peoples probable cause for the traffic stop. It is equally clear that Trooper Peoples asked Salazar questions unrelated to the traffic stop *prior to the time when he began to write the warning citation he had decided to give to Salazar and prior to initiating the computer check of Salazar and the vehicle.* Without speculating about Trooper People's motive for such questions, the Court notes that some of the responses to these queries formed the basis for the reasonable suspicion Trooper Peoples later said justified further detention of Salazar and Hernandez. Moreover, before initiating the computer check of Salazar and the vehicle and before completing the

warning citation, Trooper Peoples also asked Hernandez several questions unrelated to obtaining the vehicle registration, insurance, or her driver's license and unrelated to the speeding which resulted in the traffic stop. Importantly, these queries to Salazar and Hernandez, which occurred before the initiation of the computer check and before the writing citation were *unrelated to the following*: (1) officer safety (i.e. whether Hernandez or Salazar were in possession of contraband, drugs or weapons); (2) the speeding offense giving rise to the stop; or (3) obtaining the driver's license, vehicle registration or proof of insurance for the vehicle. The Court find that under *Pruitt* these facts establish a violation of the Fourth Amendment because Trooper Peoples asked irrelevant, "fishing expedition" questions. 174 F.3d at 1221. Where, as here, such questions are asked *prior to* the officer having some articulable reasonable suspicion, they constitute a seizure outside the scope of what is constitutionally permissible.

The Government attempts to distinguish *Pruitt* by noting that there was no consent to search given in *Pruitt* and that the motorists in that case were detained after having been questioned and given a warning ticket until a drug sniffing dog could be brought to the scene to sniff the vehicle. The Government is correct that unlike the defendant

in *Pruitt*, Salazar and Hernandez eventually gave consent for him to search the vehicle. This consent cannot be valid, however if it was given after Trooper Peoples already unnecessarily detained them. Simply put, the Court disagrees with the Government's excessively narrow reading of *Pruitt*.

Even assuming *arguendo* that the Government is correct and *Pruitt* is distinguishable from the instant case, the Court finds that under the approaches employed by either the Fifth Circuit or the Tenth Circuit, Trooper Peoples exceeded the permissible scope of the traffic stop by his questioning of Salazar and Hernandez on matters unrelated to the traffic stop prior to commencing the routine computer check. The Eleventh Circuit Court of Appeals has described the Tenth Circuit approach as one which severely limits the kind of questions which are permissible on a routine traffic stop absent reasonable suspicion. *See, e.g., Purcell*, 236 F. 3d at 1279. Clearly, Trooper Peoples' queries exceeded the scope permissible under the Tenth Circuit approach. Consequently, the Government urges the Court to instead apply the approach implemented by the Fifth Circuit.

In *United States v. Shabazz*, the Fifth Circuit Court of Appeals held that a law enforcement officer can question validly detained motorists on any subject *during the time that it takes for the computer*

check of the license so long as the questioning does not extend the duration of the seizure of the motorist. 993 F.2d at 437-38. On many occasions since its decision in *Shabazz*, the Fifth Circuit Court of appeals has upheld the holding of *Shabazz* despite the apparent reluctance of most other circuits to follow its lead. Nevertheless, the Fifth Circuit Court of Appeals recently clarified that a law enforcement officer making a traffic stop could not question a motorist about matters unrelated to the traffic stop *before commencing the computer check* because doing so necessarily unreasonably prolonged the detention of the motorist. *See United States v. Brigham*, 343 F.3d 490 (5th Cir. 2003).[18] Consequently, where, as here, Trooper Peoples admits that many of his questions to Salazar and Hernandez prior to initiating the computer check were unrelated to the speeding ticket, the permissible scope of the detention is exceeded even under the Fifth Circuit's approach.

The Government's arguments focus on the fact that Salazar and Hernandez eventually gave

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18 The Court notes that there was a dissent in the *Brigham* case which was very critical of the opinion and the case has been accepted for rehearing *en banc*. Nevertheless, the *Brigham* case, which this Court finds consistent with the holding of *Shabazz*, is the law of the Fifth Circuit as of the date of this Court's decision.

consent to search and the fact that some of the questions Trooper Peoples asked aided him in developing the reasonable suspicion it contends he had when he asked later for the consent to search. Nevertheless, this Court cannot ignore the fact that prior to the time he began to write the warning citation and prior to the time he initiated the routine computer check, Trooper Peoples asked questions unrelated to the speeding offense for which the stop was initiated, unrelated to officer safety, and unrelated to obtaining the driver's licenses, vehicle registration and insurance. Under the current law of the Fifth, Tenth, and Eleventh Circuits, these questions violated the Fourth Amendment by exceeding the scope of the traffic stop.

Trooper Peoples continued to ask questions of Hernandez and Salazar after beginning to write the warning citation and after initiating the computer check. Eventually, Trooper Peoples asked for consent to search the vehicle.[19] At the time he asked for and obtained consent to search the pickup truck, Trooper Peoples articulated the following bases for his reasonable suspicion that Hernandez and Salazar were involved in drug trafficking: (1) food

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19 Trooper Peoples testified that if consent to search had not been given he would have detained them until the drug sniffing dog could arrive and sniff the vehicle.

containers in the vehicle; (2) minimal luggage; (3) discrepancies in their stories about the nature of the trip; (4) non-stop traveling from a known source city to a known source city; (5) traveling during a tropical storm; (6) Hernandez's uncertainty about the name of her destination city; (7) discrepancies in their stories about the length of the trip; (8) unusual nervousness by Hernandez and Salazar which persisted after Salazar was told he would be getting a warning. Trooper Peoples would have been able to observe the food containers and the luggage when he approached the vehicle to obtain the license, registration, and insurance papers. The remaining factors derive from the answers to questions unrelated to the traffic stop, officer safety, or obtaining documents for the computer check. Indeed, most of the remaining factors came to Trooper Peoples' attention because of questions he asked before commencing the routine computer check, and some of these questions were asked before Trooper Peoples began to write the warning citation. Under the applicable case law, this Court has no choice but to find that these questions necessarily prolonged the time Hernandez and Salazar were detained for the traffic stop; this is true even though the total time between the beginning of the stop and the consent to search does not run afoul of the cases setting an outside limit for the total

length of a detention for a traffic stop. Had Trooper Peoples conducted the traffic stop without asking the extraneous questions prior to commencing the computer search, the stop would necessarily have been shorter. Thus, the seizure at issue violated the parameters set out in *Terry* and its progeny in this and other circuits.

The Court appreciates that given the current sate of the law, it is not easy for law enforcement officers to ascertain the permissible way to effectuate a traffic stop without offending the Fourth Amendment. The Court further notes that while it is the function of this Court to review the actions taken by law enforcement after the fact, while doing so, it has the luxury of time reflect upon the consider the issues presented by the facts of a given case which the law enforcement officer who reacts to events as they occur lacks. After two hearings, numerous hours review of the videotape of the traffic stop which lasted thirty-eight minutes, and an extensive review of existing case law, the Court finds that this case presents a close question in a less than clear area of the law. The Court hopes that its decision in this case will, either directly or indirectly, clarify some of the existing confusion in the state of the dispositive law.

Having found that Trooper Peoples exceeded the reasonable scope of the traffic stop and

consequently violated the Fourth Amendment,[20] the Court must also find that the evidence obtained in the encounter, including the forty-three pounds of cocaine hydrochloride, cannot be used against Hernandez. See, e.g., *United States v. Terzado-Madruga*, 897 F.2d 1099, 1112 (11th Cir. 1990). All of the evidence against Hernandez appears to be "fruit of the poisonous tree." Consequently, by finding that the Motion to Suppress is due to be GRANTED, the Court necessarily must also find that the Motion to Dismiss is due to be GRANTED.

CONCLUSION

Based on the foregoing, it is ORDERED as follows:

(1) The Government's Objections to the Recommendation of the Magistrate Judge (Doc. #47), as amended (Doc. #48) are OVERRULED.

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20 The Court emphasizes that in evaluating the seizure of Hernandez in this case, it did not make findings about Trooper Peoples' subjective intentions. The case law makes it plain that the law enforcement officer's subjective intentions are not relevant to the inquiry before this Court. Because this Court makes no findings about Trooper Peoples' subjective intentions, this decision should *not* be read as finding that Trooper Peoples *intentionally* violated Hernandez's Fourth Amendment rights.

(2) The Recommendation o the Magistrate Judge entered on November 17, 2003 (Doc. #46) is REJECTED in part and ADOPTED in part and MODIFIED in part as set out in this Memorandum Opinion and Order.

(3) Defendant Joanna Hernandez's Motion to Dismiss (Doc. #26) and Motion to Suppress (Doc. #27) are GRANTED in full.

DONE this 22nd day of March, 2004.

/S/
Mark E. Fuller
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA)	
	)
v.	)CR NO. 03-0142-N
	)
JOANNA HERNANDEZ	)

RECOMMENDATION OF THE MAGISTRATE JUDGE

Indicted under 21 U.S.C. § 841(a)(1) for possession with intent to distribute cocaine hydrochloride, Defendant Joanna Hernandez ("Hernandez") seeks to suppress "all evidence and statements obtained as a result of [her] unlawful detention and arrest"[1] and the warrantless search of her vehicle following a routine traffic stop for speeding. Based upon the evidentiary hearing[2]

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1 *Post-Hr'g Br. in Support of Motion to Suppress* at 10 (Doc. 43, October 31, 2003)

2 A Texas resident, Hernandez did not appear at the (continued...)

and a careful consideration of the briefs, arguments, and applicable law, the Magistrate Judge concludes, as herein explained, that the detention and search exceeded Fourth Amendment limits. Accordingly, it is the Recommendation of the Magistrate Judge that the suppression motion be granted.[3]

I. FACTS

The essential facts are undisputed and confirmed substantially by a videotape of the traffic

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(...continued)
scheduled hearing on October 16, 2003, and following a failed attempt to make telephone contact directly with her, the Court found – based on relevant representations from defense counsel– that she knowingly and intelligently waived personal appearance after advice from counsel. *Tr.* at 3 -9.

3 On August 19, 2003, Hernandez filed separate motions for dismissal and suppression (Docs.26 and 27), each alleging constitutional violations of the Fourth, Fifth, Sixth, and Fourteenth Amendments. Because she offered no evidence in support of Fifth and Sixth Amendment claims (*see Tr.* at 11-14) and specifically declined to "pursue the Fourteenth Amendment issues cited..." regarding racial profiling and selective prosecution (*see Def.'s Post-Hr'g. Br.* at 9), only the Fourth Amendment claim is properly before the Court.

stop.[4] Pursuant to his assigned duties for "general law enforcement, accident investigation, [and] traffic enforcement," Alabama State Trooper Jessie Peoples ("Trooper Peoples") was "working stationary radar" along interstate 65 on June 30, 2003, when he observed, about 3:02 a.m., "a silverish, newer-model Chevrolet pick-up truck . . . traveling in the left-hand lane northbound," at 78mph, above the posted speed limit of 70.[5] Hernandez, owner of the vehicle, occupied the front-passenger seat, along with the driver, Jesus Alejandro Salazar ("Salazar"). Trooper Peoples initiated a traffic stop at the 165 mile marker near the Hope Hull exit, northbound on interstate 65, and the videotape establishes the

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4 Offered by both the defendant (*Def.'s Ex.1*) and the government (*Gov't. Ex..4*) and admitted as a joint exhibit, the 38-minute videotape was recorded from a body microphone, worn on the trooper's belt, which transmitted to a video recording device in his car's overhead console. The videotape did not capture all of the statements and sounds at the scene either because the trooper had turned off his microphone (*Tr.*at 20:1-2;) , the equipment fails to function properly if the microphone is an "extended distance" from the vehicle (*Tr.* at 19), or due to technical malfunctions in the "loaner"video equipment.(*Tr.* at 19-21).

5 *Tr.* at 16: 12-25, 17: 4-8; 24: 4-7.

following sequence of events.[6]

(a) ***3:02:47 - 3:02:59 a.m. Trooper's initial encounter at defendant's vehicle***

Walking first to the passenger side of the vehicle, Trooper Peoples "noted that there were food containers in the rear floor area [and] it was occupied by a female passenger and the male driver." The driver complied promptly with the trooper's requests for his driver's license and for him to step back with him between the vehicles.[7]

(b) ***3:03:00 – 3:03:35 a.m. Trooper's Encounter #1 with driver Salazar [between truck and trooper's vehicle]***

As he examined the Texas-issued license for

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6 The times are those depicted on the videotape; according to Trooper Peoples, the times from the video camera may differ slightly (not "more than a minute or two")from the patrol clock used to record times on his warning ticket and reports. *Tr.* at 27:1-14. The Court has included its uncertified transcription from the discernible audio and has added pertinent testimony adduced at the evidentiary hearing to clarify inaudible or difficult to transcribe statements.

7 *Tr.* at 18: 15-17

Salazar[8], Trooper Peoples advised that he "was running 78", and Salazar replied, "I didn't realize that . . . I was trying to get to a rest room for my girlfriend - she's got diarrhea." Informed that he had just passed an exit with a rest room, Salazar expressed surprise, and the Trooper then engaged him as follows:

> Q: Where you headed to?
> A: We're going to Atlanta.
> Q: How long are you going to be up there?
> A: The weekend . . . through the week.
> Q: The whole week? .
> A: Yes sir.

Salazar exhibited no verbal or physical resistance to the Trooper's request that he come back to his vehicle and sit inside.

(c) ***3:03:49 – 3:05:47 a.m. Trooper's Encounter#2 with driver Salazar [inside trooper's vehicle]***

The videotape does not show Salazar and

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8 *Id.* at 24: 24-25.

Trooper Peoples inside the latter's vehicle, but the audiotape does capture the Trooper's questions clearly and Salazar's responses, albeit not as clearly. At the evidentiary hearing the Trooper disclosed his purpose at the time – that he "was going to write him a warning since he was not argumentative about his speed" [9] – and testified that he retrieved his warning book and was "starting to actually write the warning"[10] during his following conversation, with Salazar inside the trooper's car:

Q: Is that your truck?
A: No, that's hers.
Q: You live in Houston?
A: Yes.
Q: First time to Atlanta?
A: mine is . . .
Q: Not hers . . . What's her name?
A: Joanna Hernandez
Q: How long y'all been together?
A: [Inaudible response]
Q: Does she have family there?

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9 *Id.* at 24: 19-20, 39: 6-7)

10 *Id.* at 25: 4-9.

A: [inaudible response]
Q: Is this like a spur of the moment trip or you guys been planning it for a while?
A: well, spur of the moment [rest of response not audible]
Q: What kind of work you do?
A: [inaudible response]
Q: What's the weather like back in Houston?
A: [inaudible response]; According to Trooper Peoples, Salazar responded that "there was a tropical storm with 40 mile-an-hour winds" when he left Houston, *Tr.* at 25: 9-17.]
Q: What's your reason for speeding?
A: [inaudible response]
Q: It's the bathroom issue?
A: [inaudible response]
Q: What's her name again?
A: Joanna Hernandez
Q: She's got the registration on the truck?
A: Yes.
Q: OK, wait just a minute, OK.

Trooper Peoples exited his vehicle and approached Hernandez, still seated in the front of her truck, for the stated purpose of securing her proof of registration for the truck..

(d) ***3:05:55 – 3:08:10 a.m. Trooper's Encounter #1 with Defendant Hernandez*** *[questioned at passenger door* of her truck]

After asking Hernandez if she owns the truck and requesting registration papers, Trooper Peoples questioned her for approximately two minutes, and the following reflects the dialogue sufficiently audible for reasonably accurate transcription:

Q: Is this your truck?
Q: You got the papers?
Q: You have your ID?
A: Yes sir, I have my license.
Q: What kind of work do you do?
A: I'm a nurse.
Q: How long y'all gon be up in Atlanta?
A: Probably until Wednesday.
Q: Who's this fella back here?
A: My boyfriend . . .

Q: [Trooper directs Hernandez to remove her license for inspection]. OK, we're going to check everything. Y'all going to be in Atlanta until Wednesday?

A: Probably until Wednesday . . . I'm not sure.

Q: You're not sure?

A: Probably until Wednesday . . . it just depends on how bad she is.

[Trooper Peoples testified that Hernandez said they were traveling to Atlanta to visit her sick aunt. *Tr.* at 38].

Q: What's wrong with her?

A: They say she had a stroke but they're not in the medical field. . . .{inaudible}....

Q: They had to take her to the hospital?

A: Yes, she's in the hospital.

Q: What area of Atlanta does she live in?

A: [inaudible] . . . . I know it starts with a "G."

Q: Gwinnett?

A: Yeh, it's Gwinnett.

Q: Where's your luggage at?
A: Right here . . .
Q: Just one bag? [examining bags in body of truck]...two bags...two small bags.... alright, I'll be back with you in just a minute, OK?

(e) 3:08:17 – 3:13:00 a.m. Trooper's Encounter #3 with Salazar
[Inside Trooper's Vehicle]
Trooper contacts United States Customs

Trooper Peoples directed these additional questions to Salazar, commencing at 3:08:27a.m.

- Y'all just coming up here on vacation?
- What family members does she have up here?
- Nobody's sick...nothing like that...?

Approximately 10 seconds later, the trooper made a radio request for a license check, providing the motorists' full names, license numbers, the vehicle tag and details of the speeding offense to "U.S. Customs. . . . for license validation, if they're wanted, if there's actually warrants for them . . . and actually, they can check for border crossings on the

vehicle."[11] He did not receive an immediate reply but provided his phone number for their response.

During an interim in his conversation with a Customs representative, Trooper Peoples asks Salazar if they had been driving all night. After concluding the phone report to Customs at 3:11:20 a.m., the officer "[had] not completed [but] was close to completing" the warning ticket for Salazar."[12] Apparently while doing so, he posed these additional questions to Salazar, whose responses are not clear:

•You ever been in trouble?

•You don't have any sick relatives up there, do you?

•Did she just ask you to ride

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11 Though the person called by trooper is not identified, the videotape recorded his initial question: "*Hey, can you make a stop for me...*" *I-65 northbound at the 166?*"? Because his next statements related identifying data for Salazar and Hernandez, it appears that all of his radio communications at this juncture were directed to a Customs representative. See *Tr.* at 27: 19-22.

12 *Id.* at 28: 7-14.

along?

At 3:11:52 a.m., Trooper Peoples told Salazar: "OK, monitor your speed, OK, I'm going to write you a warning. Less than a minute later, however, he asked Salazar whether Hernandez is a licensed practical nurse or a registered nurse and solicited further information about the nature of her work.

(f) ***3:13:22 – 3:14:00 a.m. Trooper's Encounter #2 with Defendant Hernandez [still inside truck at passenger side]***

Although the audiotape does not lend itself to accurate transcription for this encounter, Trooper Peoples testified that ["coming up on 3:14 in the morning"], he returned to defendant's vehicle to "[return"] her driver's license and the registration to the truck [and] [w]e just had conversation about her being a nurse. At that point, I noted that her level of nervousness was high. She was making minimal or no eye contact; and she had a closed posture, which was her arms folded and her legs crossed." As he headed back to his vehicle, Trooper Peoples commented on his body microphone, "arms crossed

- legs together." [13]

(g) ***3:14:10 – 3:17:45 a.m. Trooper's Encounter #4 with Salazar***
[Inside Trooper's Vehicle; consent to search requested]

Prior to his fourth encounter with Salazar, Trooper Peoples had not given the warning ticket promised at 3:11:52 a.m. and had not authorized him to leave the scene; nor had Salazar refused to sign the warning ticket. Promptly upon re-entering his vehicle, he began this additional round of questions:

Q: Hey, before I let you go, you guys aren't transporting anything illegal, are you – like guns or drugs – like marijuana, cocaine?
A: inaudible response
Q: You have a problem with me searching the truck to make sure?
A: No, sir.
Q: Y'all not committing any type of terrorist activity, are you?

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13 *Id.* at 29.

A: No.

Around 3:15:08 a.m., the videotape recorded Trooper Peoples making radio contact with Trooper Brown, who regularly travels with his narcotics canine,[14] and while awaiting his arrival, Trooper Peoples' continuing questions to Salazar are recorded as follows: "So this is your first trip to Atlanta, huh?" What kind of gas mileage y'all getting on the truck? How long it's been since you've been to Mexico? What part of Mexico? Did you like it? ."

At 3:17:00 a.m. Trooper Peoples presented and explained to Salazar a consent form prepared for his consensual search of the vehicle and asks him to sign if he agreed; according to the Trooper, Salazar "did not object. . . .[h]e took it and signed the form" around 3:17:45 a.m.[15]

(h) ***3:18:08 – 3:18:53 a.m. Trooper's Encounter #3 with Defendant Hernandez [consent to search requested]***

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14 See *Tr.* at 104:11-22.

15 *Id.* at 31:18-22.

Trooper Peoples' communications to secure consent from Hernandez were not recorded, but he testified that he explained to her the same consent form executed by Salazar and had her sign as well [16] before escorting her from the vehicle to stand just in front of the trooper's vehicle during the vehicular search.

(I) ***3:19:34 – 3:39:00 a.m. Search of truck***

Assisted by Trooper Brown and his narcotics canine, Trooper Peoples searched the truck, and using a fiber-optic scope, located "vacuum-sealed packages" with suspected narcotics behind a concealed trap door modified in the rear wall of the truck's ~~extended-cab~~ seat."[17] Hernandez and Salazar were informed of the narcotics alert and advised of Miranda rights before being handcuffed and arrested around 3:38:22 a.m.. The truck was towed to an auto shop where officers "removed the rear seat, found some spliced wiring, and found a trapdoor in the center of the wall of the truck, removed the trapdoor, and it contained the bundles"

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16 *Id.* at 32:7-13; *Gov't Ex.*1

17 *Id.*. at 46-47.

seen initially by Trooper Peoples and subsequently verified to contain 43 pounds of cocaine.

Asked by the government prosecutor why he searched defendant's vehicle, Trooper Peoples explained these "several reasons":

> *First, Mr. Salazar changed on the length of the trip from the weekend to the week.*
> *. . When I asked him, I said, how long are you going to be in Atlanta. He said, well, the weekend –no, the week. There was minimum luggage in the car for the trip.. . . It was just two small bags in the back floorboard.*
>
> *They were traveling from Houston to Atlanta, which is two main source cities for narcotics. Also, there was discrepancies in their stories. He said they were on vacation; she said they were going to see a sick aunt. They left at night, traveling at night during severe weather, which was the tropical*

storm, the high winds, pretty much traveling nonstop. Another thing was that she was complaining or he said that she had diarrhea, and they drove right past a well-lit exit.

And then talking to her, I asked, you know, just what area of Atlanta. And she was – she was, like guessing the exit. And then she started guessing a city, which was– she was saying Gaines-, Gaines-, it starts with a G. So I just threw up a name, Gwinnett. And she said, yeah, Gwinnett, like she said, that's fine. It was like she was just agreeing with what I said. [18]

II. DISCUSSION

A. Contentions

Hernandez does not challenge the trooper's stop of her truck for speeding; instead, she contends

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18 *Id* at 36:10-13, 37:14-25, 38:1-18.

that "the investigative detention exceeded both its permissible scope and duration," arguing:

> Instead of pursuing the speeding violation, the Trooper began an investigation for other illegal activity by separating the two motorists and then posing the two with a series of questions designed to search for discrepancies. Next, the Trooper unlawfully prolonged the detention by not issuing a citation and returning the drivers driver's license and instead waited for a warrant check that appears to never have been completed. Trooper Peoples admitted under oath that he had already made up his mind to use the K-9 even before he asked for consent. He had also called the K-9 unit to ascertain their location in the middle of the questioning of the driver. This would indicate that the Trooper was in-fact delaying the stop to give the K-9 unit an opportunity to get to the scene to conduct a search. This was not a consensual encounter since the driver's license was not returned and the Trooper did not have an

> objectively reasonable and articulable suspicion illegal activity has occurred or is occurring.

Post-Hr'g. Br. at 4-5

Hernandez relies principally on the Eleventh Circuit's opinions in *United States v. Pruitt* , 174 F.3d 1215 (11th Cir. 1999) and most recently in *United States v. Perkins*, No. 02-15891, 2003 WL 22400700 (11th Cir. Oct. 22, 2003).

The Government relies on the "consent" exception to justify the warrantless search, and citing *United States v. Purcell*, 236 F.3d 1274 (11th Cir. 2001), contends that neither the duration – "approximately sixteen minutes.... between the stop and the [consent]" – nor the scope of the detention exceeded constitutional limits. The Government argues that detention extended reasonably and permissibly for a response to the trooper's request for a computer check on criminal histories for Hernandez and Salazar, and it denies that any questioning unrelated to the purpose of the stop unreasonably extended the detention. *Response* at 5-6.

B. Analytical Framework

This routine traffic stop does invoke the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures,[19] and it triggers the limited *Terry v. Ohio*, 392 U.S. 1 (1968) scrutiny generally reserved for police-citizen encounters which are "relatively brief," *see Berkemer v. McCarty*, 468 U.S. 420, 437 (1984), and "legitimate and restrained investigative stops short of arrests." *See Perkins*, 2003 WL 22400700, at *2, citing *Brown v. Illinois*, 422 U.S. 590 (1975) and *Purcell*, 236 F.3d at 1277 ("Because a routine traffic stop is only a limited form of seizure, it is more analogous to an investigative detention than a custodial arrest [citing *Berkemer*, 468 U.S. at 439]. Therefore, we analyze the legality of these stops under the standard articulated in Terry v Ohio. . .."]

Since addressing the constitutionality of detentions following a routine traffic stop in *United States v. Tapia*, 912 F.2d 1367 (11th Cir.1990), the Eleventh Circuit has "consistently held that once an

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19 A seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away", *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975), and a traffic stop qualifies as such a seizure. *Delaware v. Prouse*, 440 U.S. 648 (1979).

officer has briefly stopped a motor vehicle operator for the purpose of issuing a traffic violation (*i.e.*, a ticket), the officer's continuing detention of the vehicle's occupants is authorized under the Fourth Amendment only if the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Pruitt*, 174 F.3d at 1219 , quoting *United States v. Griffin*, 109 F.3d 706, 708 (11th Cir.1997) (citing *Tapia*, 912 F.2d at 1370); accord *United States v. Holloman*, 113 F.3d 192, 196 (11th Cir. 1997) (per curiam) (noting that a police stop cannot otherwise last "any longer than necessary to process the traffic violation").

Applying the *Terry* restraints on the duration and scope of post-traffic stop detentions, the *Purcell* court emphasized that "an officer's actions during a traffic stop must be "reasonably related in *scope* to the circumstances which justified the interference in the first place." 392 U.S. at 20, 88 S.Ct. 1868 (emphasis added), and as underscored in Pruitt and Holloman, the *duration* of the traffic stop must be limited to the time necessary to effectuate the purpose of the stop." *Purcell, id.* at 1277.

C. Analysis

The Government correctly notes that the Eleventh Circuit has not found constitutionally infirm detentions incident to traffic stops which have exceeded the interval in this case of approximately 16 minutes between the trooper's stop of the vehicle and the occupants' grant of consent to search. [20] These pertinent facts are undisputed: (a) the trooper promptly secured the driver's license on their first encounter and, about two minutes after the stop, began writing a warning ticket at 3:04:00 a.m.; (b) about two minutes later, he secured from Hernandez her license and registration papers; (c) around 3:08:37 a.m., he requested license validation from customs; (d) at 3:11:52 a.m., he declared to the driver his apparent intent to release him with a warning ticket and admonition to monitor his speed; (e) the trooper returned to Hernandez around 3:14:10 a.m. her license and vehicle registration documents; (f) less than a minute later, in lieu of

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20 For example, the Eleventh Circuit in analyzing "reasonable suspicion" in Terry stops, has found constitutional detentions which lasted fifty minutes , see *Hardy*, 855 F.2d at 758-61, and even 75 minutes, *see United States v. Gil*, 204 f.3d 1347, 1350-51 (11th Cir. 2000)

ever submitting the promised warning ticket to the driver for signing, the trooper solicited from him a consent to search the truck, summoned assistance from another trooper and his canine, and proceeded to secure consent as well from Hernandez. Notwithstanding that the trooper never completed his purpose for the traffic stop – by citing or warning the driver for speeding – the duration alone does not make this traffic stop constitutionally impermissible under the Eleventh Circuit's guiding precedents.

Nonetheless, this finding does not shield the officer's conduct during the detention from further evaluation because the required Fourth Amendment review must encompass the *totality of circumstances* attendant to the detention in order to assess the officer's reasonable suspicion of criminal activity warranting any detention unrelated to the traffic stop. As the court emphasized in *Tapia*, 912 F.2d at 1370:

> "Reasonable suspicion" in the context of a *Terry* stop is determined from the totality of the circumstances, *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989), and from the collective knowledge of the officers involved in

> the stop. (*citations omitted*). Such a level of suspicion is obviously considerably less than proof of wrongdoing by a preponderance of the evidence (citation omitted), or even the implicit requirement of probable cause that a fair probability that evidence of a crime will be found. *Sokolow*, 109 S.Ct. at 1585. Nevertheless, "reasonable suspicion" must be more than an inchoate "hunch" and the Fourth Amendment accordingly requires that police articulate some minimal, objective justification for an investigatory stop. (*citations omitted*).[21]

For this "reasonable suspicion" analysis, the court now examines the totality of the evidence related to Trooper Peoples' "actions during [this] traffic stop" [to evaluate whether they were] "reasonably related in *scope* to the circumstances

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21 The analysis of reasonable suspicion requires the court to give due deference to the factual inferences drawn by law enforcement officers. See *United States v. Arvizu*, 122 S.Ct.744, 750-751(2002) (citing *Ornealas v. United States*, 517 U.S. 690, 699 (1996).

which justified the interference in the first place." Trooper Peoples stopped the Hernandez truck around 3:02 a.m. for speeding and upon finding the driver "not argumentative about his speed," he escorted him to the police vehicle with the intent of giving him a warning citation; that intention did not change within the next ten minutes as the videotape records at 3:11:52 a.m. his ostensibly final admonition to "monitor your speed, OK, I'm going to write you a warning," a process which generally takes him only four to five minutes.[22]

The record discloses no reason at all for the trooper's delay in completing and issuing the warning ticket prior to 3:11:52 a.m., as he had all the information needed for that purpose; in fact, by that time, Trooper Peoples had completed, signed, and dated the ticket, including all the data requested (driver's name, address, age, driver's license state and number; description and location of offense; description of vehicle and tag number; type and location of the traffic offense) and leaving blank

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22 *Tr.* 91: 8 -16; 92: 10-12, 22-25; 93:1

only the line for "remarks."[23] Trooper Peoples offered no testimony regarding any additional information or investigation necessary to complete the warning ticket. Assuming that his decision to give a warning or a ticket required an *explanation* from the driver for his speeding, Salazar offered that explanation before being escorted to the police vehicle. Once inside the vehicle, Trooper Peoples did not ask Salazar any questions which appeared reasonably necessary for any investigation associated with the purpose of the traffic stop – save another request that he explain his speeding. That inquiry – "What's your reason for speeding?"– followed a barrage of questions unrelated to the speeding violation: their residency in Houston; whether the trip to Atlanta was a first-time trip; how long Salazar and Hernandez had lived together; whether Hernandez had family in Atlanta; whether their trip was a spur-of-the-moment trip; the weather in Houston.[24]

Following this initial conversation with

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23 *Def.'s Ex.* 3.

24 *See* chronicled events summarized *supra*, (c) 3:03:49 - 3:05:47 a.m.

Salazar inside his vehicle, Trooper Peoples left to secure from Hernandez the truck's registration documents; the reasonableness of this action merits no scrutiny as a traffic stop reasonably encompasses an officer's request for, and examination of, driver's license and vehicle registration documents. Like her driver, Hernandez complied promptly, and neither the videotape nor any testimony suggests either any undue delay in the trooper's examination of the registration documents or any questions directed about them. Instead of proceeding back to his car with the registration documents and completing the warning ticket, the evidence shows that Trooper Peoples engaged Hernandez with questions for another two minutes or so. All were unrelated to the speeding violation and, pursuant to the trooper's admitted search for discrepancies, some duplicated the inquiries already made to Salazar: the nature of her work; duration and purpose of their trip to Atlanta; her relationship with Salazar; nature and extent of her aunt's sickness and her address in Atlanta; the quantity and locate of their luggage. [25] Immediately upon returning to Salazar inside the trooper's vehicle,

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25 *See Tr.* at 98-100 and *supra*, (d) 3:05:55 - 3:08:10

Peoples sought from him corroboration for the responses from Hernandez without disclosing her responses, he asked Salazar: *Y'all just coming up here on vacation? What family members does she have up here? Nobody's sick...nothing like that . . . ?*

By 3:08:40 a.m., Trooper Peoples had spent at least six minutes with Hernandez and Salazar –longer than his own estimated time to issue a citation for the speeding violation which prompted their encounter with him. During the interval between the initial stop at 3:02:00 a.m. and 3:08:40 a.m., the trooper had not completed a ticket although he had secured all information necessary for that purpose, but he had relentless pursued several investigative inquiries unrelated to the purpose of the traffic stop. Indisputably, Hernandez and Salazar were subject to detention and seizure during this period, and no contrary contention is presented.

Initially, the court rejects any suggestion that the time between 3:02:00 a.m. and 3:08:40 a.m. represented reasonable delay for a response by Customs to the trooper's call; the videotape clearly

establishes his *subsequent* call at 3:08:42 a.m.[26] Nor

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26 In its post-hearing brief, the Government argues: "Because the Customs query had not yet been completed, Peoples' questions in the interim did not improperly extend the duration of the stop, which itself was not excessively long. Thus, Peoples' questioning was constitutional." (*Response* at 6-7). The prosecutor's questioning of Peoples concerning the Customs query is reproduced below:

Q (AUSA): It's about 3:14 and somewhere around 40 seconds on the videotape, right, when you asked for consent, right?

A: Yes.

Q: Had the driver signed the warning ticket at that time?

A: No.

Q: Had you received the information back from the BLOC or the customs office when you–where you had called?

A: No.

(THE COURT): Excuse me just a second, Trooper, had Mr. Salazar refused to sign the warning ticket?

A: No, ma'am. I just had not –

(THE COURT): You had not asked him to sign at that point.

Q (AUSA): And is it your practice to wait for a call back from Customs before you release

(continued...)

should there be any doubt concerning the significance of the investigative inquiries made prior to 3:08:42 a.m., for the trooper based his decision to search the truck on his assessment of the behavior of, and responses from, Hernandez and Salazar during this period.[27]

(...continued)

motorists? That is, were you deliberately trying to wait until you got a call back from Customs?

A: To make sure they're not wanted or to make sure his license is valid. She– well, I can't say. The agent or person that I had talked to had not called back to return that information.

Tr. at 29:16-25, 30:1-12.

27 Explaining his intent to search the vehicle, Trooper Peoples testified:

> *First, Mr. Salazar changed on the length of the trip from the weekend to the week... When I asked him, I said, how long are you going to be in Atlanta. He said, well, the weekend –no, the week. There was minimum luggage in the car for the trip... It was just two small bags in the back floorboard.*
>
> *They were traveling from Houston to Atlanta,*

(continued...)

In defense of Trooper People's questioning, the Government, citing *United States v. Purcell*, 236 F.3d at 1279, notes that "questioning, even on a subject unrelated to the purpose of the stop, is [not] itself a Fourth Amendment violation. Mere questioning . . . is neither a search not a seizure." That citation is properly attributable, however, to the

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(...continued)

> *which is two main source cities for narcotics. Also, there was discrepancies in their stories. He said they were on vacation; she said they were going to see a sick aunt. They left at night, traveling at night during severe weather, which was the tropical storm, the high winds, pretty much traveling nonstop. Another thing was that she was complaining or he said that she had diarrhea., and they drove right past a well-lit exit.*
>
> *And then talking to her, I asked, you know, just what area of Atlanta. And she was – she was, like guessing the exit. And then she started guessing a city, which was– she was saying Gaines-, Gaines-, it starts with a G. So I just threw up a name, Gwinnett. And she said, yeah, Gwinnett, like she said, that's fine. It was like she was just agreeing with what I said.*
>
> *Tr.* at 36:10-13, 37:14-25; 38:1-8.

Fifth Circuit, in *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir.1993); after noting the Fifth Circuit's view that "the issue regarding "unrelated" questions concerns not the content of the questions, but their impact on the duration of the stop," and also considering the Tenth Circuit's view on the issue,[28] the *Purcell* court did not strictly embrace either view for the Eleventh Circuit, but noted instead that the questions there in controversy would be permissible if analyzed under both the Tenth Circuit's and the Fifth Circuit's view. Thus, an appreciation for the factual context and analysis in *Purcell* is necessary in order to distinguish this case.

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28 As noted in *Purcell, id.* at 1279, the Tenth Circuit cases "severely limit the kind of questions which are permissible in a routine traffic stop, including a limitation on questions regarding contraband and weapons. *See United States v. Holt*, 229 F.3d 931,940 (10th Cir. 2000) (question exceeds reasonable scope of traffic stop absent reasonable suspicion of illegal activity or reasonable safety concerns); *United States v. Jones*, 44 F.3d 860 , 872(10th Cir. 1995) (holding that questions regarding transportation of contraband, are justified only if the officer has reasonable suspicion of illegal activity); *United States v. Turner*, 928 F.2d 956, 959 (10th Cir. 1991) (holding that officer must have reasonable and articulable suspicion to question the driver about drugs or weapons).

A sheriff's deputy in *Purcell* stopped a vehicle for following too closely another vehicle on an interstate. Upon examining the license and rental agreement tendered to him by the driver, the deputy noted that the agreement was not in the driver's name and that his name had been deleted as an additional driver. After securing identification from the two passengers, the deputy radioed a request for a license/tag computer checks and began writing a traffic citation to the driver while he awaited a response. The court states the remaining relevant facts as follows:

> *Prior to asking Purcell to sign the citation, Deputy Warren asked him if he had ever been arrested. Purcell replied that he had and that the arrests were drug related. The deputy then asked Purcell if he had "any narcotics, weapons, firearms, contraband, anything like that in the car." Purcell replied that he did not. At this point, approximately fourteen minutes into the traffic stop, Shon Purcell consented to a search of the car, saying, "I've got nothing to hide." Id. at 1276.*

After unsuccessfully seeking to suppress the cocaine found in the search of the vehicle, the Purcells appealed their guilty plea convictions and contended, in part, that the deputy "exceeded the scope of a permissible traffic stop when he asked them whether they had guns, firearms, or narcotics in the car." Concluding that under either the Tenth Circuit's or the Fifth Circuit' tests, "[the deputy's] question about guns or drugs was permissible," the court explained:

> He had stopped a vehicle in a very high crime corridor, where armed drug couriers ply their trade daily. The driver, Shon Purcell, produced a rental car contract signed by a party not in the car. Although it listed Shon Purcell as an additional driver, his name had been scratched out. While writing the citation, he asked Shon Purcell if he had a record and Purcell admitted that he did and that it was drug related. At that point, even if his suspicions did not arise to the level of "articulable" (footnote omitted), reasonable safety concerns justified Deputy Warren in asking Purcell whether he had any

> firearms, guns, or drugs in the car. (citation omitted). Furthermore, the question regarding weapons was asked while the officer was still writing out the citation and awaiting the results of the computer check. (footnote omitted) Thus, the unrelated question did nothing to extend the duration of the initial, valid seizure. The detention continued to be supported by the facts that justified its initiation."

The *Purcell* facts are patently too dissimilar from this evidentiary record to compel the same conclusion. In the first place, Hernandez — unlike the appellants in *Purcell* and the Tenth Circuit cases – does not focus her constitutional attack on a single inquiry regarding contraband or weapons in the vehicle – an inquiry ultimately made by Trooper Peoples to her driver over twelve minutes into the detention, and followed immediately by a request for permission to search in order to corroborate his negative response. Her focus is on the interrogative detention before the trooper even requested any license validation and before he inquired about contraband or weapons; that detention – while not

an "excessively long duration"–kept Hernandez seized and detained for a purpose wholly unrelated to the purpose of the traffic stop, and the analytical focus is whether reasonable suspicion of criminal activity warranted such detention. Contrary to the cases which reflect the Fifth Circuit tests and contrary to *Purcell*, the questioning at issue does not occur while the officer is waiting for a computer check on the driver's background, and neither evidence of concern for the trooper's safety[29] nor any articulable suspicion of criminal activity even necessitated any computer check with customs.[30]

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29 The *Purcell* court acknowledged the "well established [rule] that officers conducting a traffic stop may 'take such steps as [are] reasonably necessary to protect their personal safety' (citations omitted) and that "[m]any courts have recognized that knowledge of the criminal histories of a vehicle's occupants will often be relevant to that safety." *Id.* at 1277 The record is void for any threat to the trooper's safety, and any threat is belied by the fact that the trooper allowed Hernandez to remain – unrestrained – inside her car while he questioned an equally unrestrained Salazar alone inside his vehicle.

30 The trooper's decision to call "U.S. Customs" rather than the Department of Public Safety (DPS) is not explained by (continued...)

Indeed, Trooper Peoples' testimony casts considerable doubt on whether he delayed the completion and delivery of the promised speeding citation in order to get a response from Customs or to follow his hunch of criminal activity by getting a narcotics canine at the scene for a search he already intended to make. After making the call to Customs at 3:08:42 a.m. and completing it around 3:11:20 a.m., Trooper Peoples awaited a response on his cell phone, but left it inside his car while he continued his communications with Salazar inside, and Hernandez outside, and he began searching the truck less than ten minutes later. Though he testified that Customs can report "*within four or five minutes; sometimes it's 15 minutes. And they'll usually tell you that, hey – we're having trouble*

(...continued)
reference to any specific, articulable facts pointing to criminal culpability for Salazar or Hernandez. Questioned by defense counsel about the choice, Peoples acknowledged using both DPS and Customs for "background checks" and explained his choice of the latter by reference to the Texas tag on the Hernandez vehicle (*Q: And how do you decide when to use Customs? A: Just – Texas is a border state to the –to Mexico. And I use it for – to see if there's any nexus to the border. Tr.* at 52:3-6)

getting responses from this state or this state," he did not secure any estimated response time, made no request or follow-up call, and never did get the background check requested. [31]

The trooper acknowledged that he formed his intent to search the vehicle during the six minutes of his investigative detention between 3:02 a.m. and 3:08 a.m. and even before he requested a Customs check. The following colloquy with defense counsel is pertinent:

> Q: Now, in the video when you call – you already mentioned you called Customs. But the second part – the second person you called when you asked for their 20, that was Mr. Brown, Chris Brown.
>
> A: Correct.
>
> Q: And he was in the area.

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31 *Tr.* at 53 -54). Asked if he ever got the requested background check, Trooper Peoples responded: "After– after noting the– I don't recall if it was, you know, during the stop – I'm not–sorry – you know, after we had located the contraband. But after obtaining a consent and finding the aftermarket modifications on the truck and after finding the contraband, that just – I just totally disregarded that." *Tr.* at 90: 22-25, 91:1-2.

A: Correct.
Q: His response in the video you can't really hear. But what was his response? How far away was he from you?
A: Two miles. He said he was at the 168. We were between the 165 and 166 mile marker.

Q: Now, regarding Mr. Chris Brown, as far as you know, how long has he been with a canine?

A: Probably seven or eight years. That's a guess.
***
Q: And you've worked with him on different cases?
A: Yes.
Q: You were probably going to call Chris Brown – you were going to call him either way, whether there was consent to search or not; is that correct?
A: Yes.
Q: So you already had in your

mind to call Chris Brown to search that vehicle; is that correct?

A: After – after talking to the individuals, yes.

Q: That was way before you asked for consent.

A: I believe it was right before I asked for consent.

Tr. at 56-57 (emphasis added).

In response to the court's pointed inquiry, Trooper Peoples explained his decision further:

The Court: All right. I want to make sure that we get a complete record. So let's do this, Mr. Ramirez. You asked him at what point in time he decided to call Trooper Brown to conduct the canine search. Let him give his complete answer first and then examine him about it. He had begun a litany of reasons relating to when he decided to call Trooper Brown.

[To Trooper Peoples: Would you continue and complete your answer?]

[To Mr. Ramirez: Then you may examine him].

A: (Trooper): After talking to the driver and the passenger and noticing that the vehicle – the contents – the food containers in the vehicle, the minimum or no luggage, the discrepancies in their story of the nature of the trip. They were traveling from a known source city, which is Houston, to Atlanta, which is another source city. They left in tropical storm conditions. She appeared to be unsure of the destination she was traveling to. She started with the Gaines-, Gaines-, it starts with a G; and I threw out Gwinnett, so she immediately said, yeah, it's Gwinnett. And the length of the trip. First it was we're staying for the weekend; no, we're staying for the week. So there's discrepancies there. At that point, I thought there was a secondary crime being committed, and I was going to ask for consent to search.

Q: (Mr. Ramirez): And I think you mentioned even if he said no to the

consent, you were still going to use the canine; is that correct?

A: I would have asked Chris to deploy his canine on that truck. Yes.

Given the trooper's admission that he determined to search the vehicle – with or without consent from Hernandez – after talking with them during a six-minute interval immediately after stopping their speeding vehicle, the analysis properly shifts to whether he acquired at that time any reasonable suspicion of their involvement in criminal activity. After considering all of the reasons he highlighted, within the evaluative framework provided by Eleventh Circuit precedent, this court concludes that they fall woefully sort of the requisite "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[32] *See Tapi*a, 912 F.2d at 1370. It appears at most that the

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32 The videotape shows the time as 3:14:00 a.m. when the trooper returned to Hernandez her driver's license and registration. Though he is not heard advising her that she was then free to leave, it is clear that she was detained involuntarily until at least that time, and arguably longer, as the trooper had not yet released the driver.

trooper's conduct reflected nothing more than an inchoate "hunch", perhaps borne of experience or predisposition, that these particular motorists were engaged in crime.[33]

As underscored during the relevant cross-examination on this issue, the discrepancies and responses deemed suspicious by Trooper Peoples – considered individually and collectively – were subject to reasonable explanations inconsistent with reasonable suspicion of criminal activity.[34] For

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33 Although Hernandez sought to establish a practice by this trooper of making routine traffic stops of Hispanic motorists and extracting their consent for vehicular searches, the claim was not developed and, in fact, was abandoned for this suppression motion. Thus, this court should not be construed as expressing any judgment in that connection.

34 Though clearly not intended as an exhaustive list, the following factors were highlighted in *Purcell, Id.* at 1220, among the "variety of factors [which] may contribute to the formation of an objectively reasonable suspicion of illegal activity: . .. having no proof of ownership of the vehicle, having no proof of authority to operate the vehicle, and inconsistent statements about destination (*citations omitted*) .... driving with a suspended license (*citations omitted*) and reluctance to stop (*citations omitted*). None of these factors

(continued...)

example, while "inconsistent statements about destination" can "contribute to the formation of an objectively reasonable suspicion of illegal activity," *Pruitt* at 1220, both Hernanez and Salazar confirmed Atlanta as their destination and though they offered different plans upon arrival, even the Trooper admitted that each reason could be true.[35] The trooper's suspicion that their luggage raised doubts about the stated purpose of their trip is undermined by his admitted ignorance of the quantity of clothing contained in the "two small bags."[36]

Trooper Peoples pointed not only to his perception of inconsistent or untruthful responses but also his perception of nervousness by both Hernandez and Salazar. Adding this component to the "totality of the circumstances" still fails, however, to provide the reasonable suspicion

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(...continued)
is evidenced on this record.

35 *Tr.* at 83-84.

36 *Id.* at 81-82. Similarly, Trooper Peoples had no basis for denying the non-criminal explanations suggested for the fact that Hernandez and Salazar had been traveling all night and had food containers in the truck. *Id.* at 86-87.

requisite for this detention. Concerning his observations of Hernandez, the officer conceded that her "closed posture" could just as well reflect her earlier expressed need to use a bathroom.[37]

Weighing collectively all of the reasons offered by Trooper Peoples, as the "totality of the circumstances" analysis requires, they fail to buttress a "reasonable suspicion of criminal activity" precisely because no evidence is offered to connect them for such an inference. No evidence provides any credible basis for the trooper's inference that these night-time, licensed travelers in a registered vehicle evinced any pattern, practice, or demeanor unique to narcotics or other criminal activity. Neither attempted to flee, possessed weapons or made threatening statements or moves; the videotape

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37 *Tr.* at 84:24-25, 85:1-11. The trooper also conceded that the nervous behavior he attributed to the driver could have reflected the general anxiety experienced by stopped motorists, especially when they are escorted to sit inside a police vehicle (Tr. at 86:2-13); moreover, notwithstanding his testimony that the driver exhibited a "high anxiety level" indicative of "somebody that's committing a secondary crime or that's wanted" (*Tr.* at 110:13-15), he admitted that further investigation cleared Salazar of any criminal involvement with the drugs seized. (*Id.* at 112).

depicts neither clothed in a manner which should reasonably alert a trained officer to criminal activity. Trooper Peoples – on traffic patrol duties – offered no testimony that he had any reason to stop these motorists independent of his radar-confirmation for speeding less than 10 miles over the posted limit. No evidence suggests any readily discernible details about the truck or its occupants sufficient to convert a routine traffic stop into an investigation for drugs and other contraband for which the totality of circumstances indicated no reasonable suspicion. Indeed, only one of the various reasons proffered by the officer directly implicates – and reflects the officer's knowledge of – drug trafficking patterns: the fact that Houston, the point of departure for Hernandez and Salazar, and Atlanta, their destination, have each been determined by law enforcement analyses to be a "source city" for drug trafficking. Because there is no evidentiary basis to accord this single fact either inordinate or dispositive weight in considering the totality of the pertinent reasons and circumstances, this Court concludes that insufficient reasonable suspicion of criminal activity justified the detention of Hernandez following this traffic stop and the effective completion of its purpose. Accordingly,

the consents secured during the unlawful detention were tainted by the officer's Fourth Amendment violation, and under these circumstances, the consent by Hernandez cannot be deemed voluntary.

This conclusion is buttressed by the Eleventh Circuit's most recent analysis of this question in *Perkins,* another case from this District involving a detention and vehicular search following a traffic stop. In *Perkins*, an Alabama Highway patrol officer initiated a traffic stop after observing erratic driving. After explaining to passenger and driver the purpose of his stop, he secured the driver's license and insurance papers and "asked [him] to get out of the car so he could give [him] a warning ticket for a lane violation, assuring him that, after the issuance of the warning citation, he would be free to leave." *Perkins*, 2003 WL 22400700, at *3.

Like Hernandez in this case, the passenger remained in the car while Perkins sat in the patrol car for the officer's completion of a warning ticket, during the course of which the following occurred, as summarized by the appellate court:

> *Noticing the Tampa address on Perkins' Florida driver's license, Colston asked Perkins if Tampa was his ultimate destination. Perkins' negative response prompted Colston to*

> *ask him a series of questions about his residency, employment, and destination. Perkins explained that he had once lived in Tampa but had since relocated to Montgomery, Alabama, where he was employed at Rhodes Furniture. In response to Colston's questions about his destination, Perkins indicated that he was headed to Greenville, Alabama. According to Colston, Perkins was extremely nervous, breathed rapidly and repeated Colston's questions before answering them. Perkins was not free to leave during this questioning.*

Id.

The officer radioed the dispatch officer to conduct a driver's license check, and while awaiting the response, he questioned Perkins extensively, inquiring about his passenger's residency, his own residency in Montgomery, his intent to secure an Alabama license, and the person he intended to visit in Greenville. Upon receiving a response indicating a valid license and no outstanding criminal warrants for Perkins, the officer gave him the completed warning ticket. Though acknowledging that he had then completed "that portion of his investigation

relating to the traffic stop," the officer "continued to detain Perkins because of his nervousness; what he perceived as Perkins' evasive behavior in response to his questions; and his hunch that Perkins was being untruthful about his destination." *Id.*

Similar to Trooper Peoples with Hernandez, the officer in Perkins approached the passenger, apparently to corroborate the responses by Perkins, and also asked him "if the car contained any contraband or other illegal substances." Like Hernandez, the passenger "was not free to leave during this questioning." After completing his questioning of the passenger, the patrol officer returned to Perkins, "retrieved the signed warning citation . . . . and asked whether the vehicle contained any contraband or other illegal substances." A negative response triggered his request for consent to search, and when Perkins refused, the officer "called the dispatch officer and requested a drug-sniffing dog," detaining both driver and passenger for the subsequent search and further interrogation leading to the seizure of drugs from the center console.

The *Perkins* court first rejected the argument that the duration of the traffic stop itself– approximately fifteen minutes for the entire stop –

was unconstitutional under Terry.[38] Nonetheless, the court "conclude[d] that the circumstances here do not give rise to the requisite reasonable suspicion justifying continued detention of Perkins and Scott after the warning ticket had been issued." *Id.* Similar to the government's position in this case, in Perkins the government argued that "the totality of the following circumstances gave rise to a reasonable suspicion of drug trafficking: (1) Perkins' nervousness; (2) the "odd behavior" of Perkins in repeating the questions Colston asked him; (3) Perkins' possession of a Florida driver's license while claiming to live in Montgomery, Alabama; and (4) the "inconsistent" statements from Perkins and Scott with regard to whom they were going to see in Greenville, Alabama." The Court found that "these circumstances, separately or cumulatively, cannot support a legitimate inference of further illegal activity that rises to the level of objective, reasonable suspicion required under the Fourth Amendment." *Id.*, *5.

Of particular relevance on this analysis is the Court's evaluation in *Perkins* of the officer's perception of the driver's nervous behavior and the

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38 See *Rec.*of Magis. Judge (Oct.3,2002, at 10); *Perkins*, 2003 WI 22400700 *4.

differing responses of driver and passenger regarding their intended purposes for their trip to Greenville:

> First, the Supreme Court has noted that a traffic stop is an "unsettling show of authority" that may "create substantial anxiety. "*Delaware* , 440 U.S. at 657. There is no reason [the officer] should have reasonably suspected that Perkins' nervousness was tied to anything other than the fact that he was being momentarily detained by an authority figure with police power over him. On cross-examination, [the officer] admitted that a nervous driver is not itself suspicious....finally the answers given by Perkins and Scott as to whom they were going to see in Greenville, Alabama, do not support reasonable suspicion....Scott's answer did not contradict Perkins' answer in any way. Perkins and Scott could have intended to see both persons during their visit, or Perkins could have intended to visit Shantay while Scott visited Quinn....In this Court we have required more than the innocuous

characteristics of nervousness, a habit of repeating questions, and an out-of-state-license for giving rise to reasonable suspicion. *See, United States v. Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999). (**Holding that the fact that the driver was Hispanic and had a out-of-state license plate was not enough to detain him beyond the issuance of the speeding ticket**); *United Stated v. Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990)("**Being Mexican, having a few pieces of luggage, being visibly nervous or shaken during a confrontation with a state trooper, or traveling on the interstate with Texas license plates (not yet a crime in Alabama)...fail to suggest that the appellant ...[was] engaged in criminal activity other than speeding on the highway**.")
(emphasis added).

III. CONCLUSION

Based upon the foregoing findings and conclusions, it is the Recommendation of the

Magistrate Judge that the motion to suppress (Doc.27, filed August 19, 2003) be GRANTED, that the motion to dismiss (Doc.26, filed August 19, 2003) be GRANTED to the extent that it asserts the same Fourth Amendment claim presented in the suppression motion, and that the dismissal motion be DENIED without prejudice to the extent of its additional Fifth, Sixth, and Fourteenth Amendment claims.

Done this 17th day of November, 2003.

DELORES R. BOYD
UNITED STATES MAGISTRATE JUDGE

ORDER

The clerk of the court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of the mailing to them. Any objection filed must specifically identify

the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive, or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from *de novo* determination by the district court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the district court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (11th Cir. Unit B1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

DONE this 17th day of November, 2003.

DELORES R. BOYD
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
OCT 27 2006
OFFICE OF THE CLERK

NO. 06 - 209

IN THE

Supreme Court of the United States

JOANNA HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

RUBEN RAMIREZ
Attorney for Petitioner
520 West Pecan Blvd.
McAllen, Texas 78501
(956) 618 - 1200

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PETITION FOR REHEARING

I.

Not with standing the Eleventh Circuit opinion in the present case, there is at least three district courts that have also interpreted *Muehler v. Mena 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005),* to apply to traffic stops. (See *Dabbs v. Crosby*, Not Reported in F. Supp. 2d, 2005 WL 2456220, (M.D. Fla.), *U.S. v. Smith*, Slip Copy, 2006 WL 2226313 (M.D. Fla.), and *U.S. v. Maddox*, Not Reported in F. Supp. 2d, 2005 WL 3307213 (M.D. Fla.). In *Meuhler* this Court held that no independent reasonable suspicion was required for officers to question persons about immigration status while being detained during a search for weapons and evidence of gang membership. The court in *Dabbs* ruled that "Although the seizure in *Muehler* was conducted pursuant to a search warrant, we believe that the focus on duration (and not scope of questioning) is just as applicable to a lawful traffic stop." (*Dabbs* p. 13) Hernandez would urge this Court to reconsider five issues that are very important

regarding case.

First, without this Court clarifying whether *Muehler* extends to warrantless traffic stops, where there is no apparent danger to the police officers, there will be many courts interpreting *Muehler* as applying to warrantless searches of motorist on public streets. *Muehler* clearly applies to the situation where the police has a legal search warrant and, more importantly , there is imminent danger of weapons being found. If *Muehler* extends to motorist on public roads the expectation of privacy which forms the cornerstones of the Fourth Amendment are compromised.

II.

Second, Petitioner's case is important to clarify how far a police officer can extend his inquiry of a legally stopped motorist. Petitioner would argue that police have been afforded great latitude in asking questions of a motorist that are unrelated to the traffic violation. This intrusion into the motorist private affairs not only violates the privacy

issues protected by the Fourth Amendment but has been used as a tool by police to extend a legitimate traffic stop into a drug related investigation.

This issue has not been addressed in such cases as *Muehler* and *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

III.

Third, the Petitioner would urge this Court to reconsider the issue of geographical profiling as an extension of racial profiling.

In this case the officer admitted that he used the fact that the motorist had Texas license plates as a factor in developing reasonable suspicion to detain the motorist. The officer also admitted that he noticed that the driver was Hispanic and had a Spanish sur-name. The officer called the U. S. Customs Department to run a records check to include border crossings since Texas borders Mexico. The officer even asked the driver

how long had it been since he was in Mexico, what part of Mexico and if he liked it.

This geographical profiling, as used by the officer in this case, was used as a veil to cover any admission by the officer of racial profiling. The officer testified that race was never a factor in developing reasonable suspicion. His actions and careful wording cannot hide the underlying fact that because the motorist was of Hispanic descent and from Texas, the officer clearly used race and geographics in prolonging the traffic stop, thus violating the Equal Protection Clause of the Fourteenth Amendment.

IV.

Fourth, Hernandez would argue that the District Court, in applying the totality of the circumstances test found in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889(1968), was in a better position to judge whether the answers to the questions posed by the officer gave rise to reasonable suspicion to prolong the stop. In cases where the police are looking for any little discrepancy to build

a case, the trail court should be given the benefit of the doubt when it comes to reviewing the total circumstances surrounding the questions and plausible explanations by the motorists. See *United States v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002).

V.

Finally, the Eleventh Circuit in this case questions "whether the Fourth Amendment's prohibition of unreasonable seizures is concerned with such trifling amounts of time, when the seizure was caused at the outset by an apparent violation of the law." (*U.S. v. Hernandez*, Footnote7, p. 1212)

The Eleventh Circuit's opinion in this case seems to concern itself with duration of stop and not the intrusion into the private lives of citizens. If such thinking is the norm, then officers may be entitled to ask as many non-related questions as they may see fit within a "reasonable amount of time" until

one answer does not fit into his narrow minded, biased opinion. The simple answer given by the driver in this case of his girlfriend having diarrhea, which may be one of the most common excuse given to police to get out of a traffic ticket, allowed the police to interrogate further and turn a simple traffic stop for going 8 miles over the speed limit into a major drug investigation. The officers further reasons were, 1.) empty food containers, 2.) different thoughts on how long the trip would take, 3.) nervousness (which has been held as insufficient reason), 4.) travel at night, 5.) severe weather (in Houston only, the storm did not follow to Alabama), 6.) The Defendant forgot the name of the town, 7.) travel between Houston and Atlanta, and 8.) in the officers opinion, the luggage was "too small". If such opinion is allowed to stand, officers are given unlimited authority to conduct "fishing expeditions" which the Eleventh Circuit had previously ruled to be unconstitutional. (See, *U.S. v. Tapia*, 912 F. 2d 1367 (11th Cir. 1990).

For the above reasons, Joanna Hernandez would urge this Court to grant this

Petition for Rehearing and accept her Petition for Writ of Certiorari.

Respectfully submitted,

LAW OFFICE OF RUBEN RAMIREZ
520 West Pecan Blvd.
McAllen, Texas 78501
Telephone: (956) 618.1200
Facsimile: (956) 618.3749

RUBEN RAMIREZ
ATTORNEY FOR PETITIONER

CERTIFICATE OF COUNSEL

Now Comes, Ruben Ramirez, Attorney for Petitioner and hereby certifies that the attached Petition For Rehearing is restricted to the grounds specified in paragraph 1 of Rule 44 of the Rules of the Supreme Court of the United States and/or is a matter of Petitioner's rights as established by the Constitution of the United States of America. The attached Petition For Rehearing is presented in good faith and not for delay.

Signed this _____ day of October, 2006.

_____

RUBEN RAMIREZ
ATTORNEY FOR PETITIONER